REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

BY TIMOTHY LUDDEN,
REPORTER TO THE STATE.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

HON. JOHN S. TENNEY, LL. D., CHIEF JUSTICE.

HON. RICHARD D. RICE,
HON. JOSHUA W. HATHAWAY,
HON. JOHN APPLETON,
HON. JONAS CUTTING,
HON. SETH MAY,
HON. DANIEL GOODENOW,
HON. WOODBURY DAVIS,

} ASSOCIATE JUSTICES.

HON. NATHAN D. APPLETON, ATTORNEY GENERAL.

CASES

REPORTED IN THIS VOLUME.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

WHO HEARD AND DETERMINED THE CASES

FOR THE

EASTERN DISTRICT,

1857.

———o———

HON. JOHN S. TENNEY, CHIEF JUSTICE.
HON. RICHARD D. RICE, J.
HON. JOSHUA W. HATHAWAY, J.
HON. JOHN APPLETON, J.
HON. JONAS CUTTING, J.
HON. DANIEL GOODENOW, J.

ALL OF WHOM CONCURRED IN THE OPINIONS IN THE CASES FOLLOWING, UNLESS OTHERWISE INDICATED.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1857.

—o—

COUNTY OF PENOBSCOT.

—o—

EBENEZER WHEELDEN *versus* JOHN H. WILSON.

Parties being witnesses, must testify, subject to the same rules as other witnesses, unless restricted by the law which permits them to testify.

A witness who is also a party to the suit, may testify as to his motive in reference to facts which are within his personal knowledge, competent to be proved and pertinent to the issue.

A stock of goods mortgaged, "in store No. 2, Glidden Block," were subsequently moved to another store. It was held that all the goods in store No. 2 at the time of the mortgage, were covered by it. That moving them from one store to another would not destroy the mortgagee's right to them, though it might render it more difficult to identify them.

Facts and circumstances clearly indicating an intention on the part of both mortgager and mortgagee to place the mortgaged property beyond the reach of legal process, and thereby to delay, if not to defeat creditors, constitute a legal fraud, which may overcome the denial of the mortgagee of a fraudulent motive on his part.

This is an action of TRESPASS, brought against the defendant, who was sheriff, for the act of one Bicknell, alleged to be his deputy, in taking and carrying away the goods of the plaintiff, and comes before the full court on EXCEPTIONS to the

rulings of APPLETON, J., and on MOTION to set aside the verdict, which was for the plaintiff.

The defence was the general issue and a brief statement, that the goods were attached and taken on a process duly issued out of, and now pending in the court.

The plaintiff introduced a mortgage from George R. Wheelden to himself, of all said Wheelden's stock of goods in store No. 2, Glidden's Block, on Exchange street, Bangor, opposite the Veazie Bank, consisting of ready-made clothing, cloths, and furnishing goods, dated March 8, 1856, recorded March 8, 1856, 3 o'clock, 15 min., P. M. Also a mortgage from George R. Wheelden to Charles H. Jones, of all the goods, wares and merchandise in the store, at the date thereof, occupied by said Wheelden, on the corner of Exchange and Washington streets, in said Bangor. Mortgage dated December 23, 1854, recorded December 29, 1854. Also an assignment of said mortgage, from said Jones to the plaintiff, dated May 5, 1856.

Plaintiff called George R. Wheelden, who testified that his store was No. 2, Glidden's Block, on Exchange street, opposite the Veazie Bank. He presented a list of articles in the store at the date of the second mortgage, and their value as he estimated them. That a part of those goods were in the store at the date of the *first* mortgage, enough to pay what is now due on that mortgage. This stock was replenished from time to time by the proceeds of goods sold. The goods were taken and sold by the officer, Bicknell.

I was fearful that somebody might strike. I put them so that I might keep my stock, so that no one could jump upon me. I made the mortgage so that one should not get the whole, and the rest get nothing. I told father when I had his name, that if I saw any chance for trouble, I would so secure him that he would lose nothing by being security for me. I did not know but some one might strike; I did not know who. I was afraid some might attach, so I put it in shape, so that I could make an equal division. This is the conversation had with father. I told him creditors might

trouble me. I wanted to secure him, and do business in his name, till I could settle my old matters up. Told him how much I owed White, and how much Sabine and other creditors; that the demands were over due, and that I was apprehensive they might strike upon me. He came up to have the mortgage made out; I thought I had better give a mortgage to secure him and me.

Ebenezer Wheelden, the plaintiff, testified: My son has told the truth as to the transaction, and I cannot state it any differently from what he has.

Question by plaintiff's counsel—"What was your motive in taking the mortgage?" *Objected* to by the defendant and *admitted* by the court.

My motive was to secure what I had let him have, and what I had signed for him; I had no other motive. He always said he would secure me. His story is true; I do not know as it is of any use for me to tell it again. He said when he came down that morning, that he was owing a number round about, and he did not know but what some of them might make trouble or costs. He told me how it was. He thought it best to come up and have a mortgage made. Don't know whether he or I got the mortgage made; cannot say who paid for the mortgage, whether he or I did; cannot say who paid for recording; think he did. I went to the clerk's office with him.

Blake and *Garnsey*, counsel for the defendant. Each submitted able arguments in writing. Mr. Garnsey upon the exceptions, and Mr. Blake upon the motion, as follows:

1. The verdict is against evidence. The testimony of the father and son both indicate fraud.

Some of the *indicia* of fraud are:

1. The *hurried* manner in which the mortgage was made.

2. That when the $500 note was given by the son to his father, there was no *receipt* taken; that it was in full, or to go in payment of old notes or of liability as endorser, but the father *retained* the old notes, and could *after*, as well as

before, have sued in case of his taking up any paper where he had endorsed or guaranteed.

3. The note was *written* on the same sheet with the mortgage, and both delivered back to the son, for he takes them and carries them to the city clerk's office, and pays for the recording.

4. And the son could have taken them from the clerk's office, if so disposed.

5. The plaintiff produces a $250 note, dated April 1, 1851, and says, "I let him have the money at that date. The date of the note shows when it was made." Yet he admits it was made "within three minutes," that is, fixed up preparatory to this trial.

6. This $500 note and mortgage was given when the son did not *suppose* he owed his father anything, and he thought the unsettled account with E. and L. Wheelden was about square. Is not his *intent* thus apparent?

The son said to White, "I thought I did not owe him anything; that was the day of the date of the writ."

White says, "he told me he did not owe his father;" that he "was not in debt beyond what he recently become liable for."

7. The $500 note was given on a year, and the mortgage provides that the son shall retain possession for the year. Is not this conclusive evidence that *bona fide* security was not contemplated by the *father* any more than by the *son*. *Brinley* v. *Spring*, 7 Maine R., 252.

8. The son says, "he advanced me $250, in 1851; can't tell the date; it was in the fall; gave my note for that." Literally true it may be, but just as much a *falsehood* as his father's statement, for it left on the mind of the jury the impression it was given in 1851, as his father first swore, but it was in fact given a few days before the trial, and *antedated*. The *son*, like his *father*, intended to deceive.

9. The father was to run the store, the son swears, and yet he had the right to buy in his father's name, and appropriate money received on such debts as he pleased, "to pay

up demands," &c., and "part where I was holden." This is a *secret trust.*

These are some of the *indicia* of fraud enshrouding the whole case—the footprints that point all one way, and by following their direction a little way, we come to the direct admission by the son, that the mortgage was made to delay creditors, and that his father was told by him why and wherefore it was so made, and his father admits all the son's statements to be true.

Now there is no doubt but the jury would have found the mortgage fraudulent, but for the answer of the plaintiff, that "my motive was to secure what I had let him have, and where I had signed for him; I had no other motive."

But he takes the mortgage with the knowledge communicated by the son. The son's object, viewed most favorably, was to secure a *bona fide* debt, and at the same time to deter his creditors from attaching. And this the father knew, so he knowingly aided his son to commit a fraud, though his principal purpose may have been to secure his debt. But the *end* will not justify the *means*. He was "*particeps criminis*," and as the court well say, in 16 Mass. R., 324, "in the case of a fraudulent assignment there can be no lien in favor of the assignee." "The man who fraudulently receives the property of another, to prevent its being attached, ought not to have the right, against the will of the creditors, whom it is attempted to defraud," "to secure his own debt, and aid his friend to lock up his property from attachment."

It is well said, too, by this court, in 4 Maine R., 207, that "if a conveyance is made by a man who is insolvent, upon a good and sufficient consideration advanced to him, but not *bona fide*, and the purchaser is connusant and assenting to the fraudulent intent, it is void against creditors."

And it does not relieve this case that the mortgager intended no fraud to his creditors, as a body, and in the end designed it, if he did, for their eventual good. *Kimball* v. *Thompson*, 4 Cush. R., 446.

Though I think the real object was not to secure the father, but that a *debt to the father* was used as a *cover*, to conceal the real object, viz: to delay creditors.

He mortgaged his whole stock, without an account being taken, without marking them anew, and being all the property he had, being seven to eight hundred dollars, and at a low estimate, as he swears, to secure five hundred dollars.

This case is very similar, in point of fact, with *Crowningshield* v. *Kittridge*, 7 Met. R., 522. And it settles this case.

"The mortgage was enough to pay all my debts, leaving no surplus," he says, and yet all is pledged to father, with design to delay *other* creditors, and father co-operates in the same design, to aid his son.

Is not this fraud? Son gave mortgage, he says, in another place, "to secure *him* and *me*." Is there not a secret trust here?

A. H. Briggs, counsel for the plaintiff.

The only question raised by these exceptions, worth discussing, is, whether the mortgage describing certain goods, while in one store, still covered them when removed to another.

There seems to be no reason why the plaintiff should not be entitled to hold the property mortgaged to him, let the mortgagee or himself carry them whither they will.

The plaintiff had a mortgage executed prior to the defendant's attachment.

That mortgage contained a full and sufficient description of the property—"being the stock in trade at that time in a certain store on a certain street in Bangor. *Wolfe* v. *Dorr*, 24 Maine R., 104; *Burdett* v. *Hunt*, 25 Maine R., 419; *Smith* v. *Smith*, 24 Maine R., 555.

That mortgage was recorded before defendant's attachment, and legally recorded. The time of being recorded was noted on the mortgage. R. S., ch. 125, ss. 32 and 33. *Handley* v. *Howe*, 22 Maine R., 176.

The recording of that mortgage was equivalent to a delivery of the goods. *Goodenow* v. *Dunn*, 21 Maine R., 86.

Thus fortified in title, and there being no fraud, as the jury have found, had not the plaintiff a right to take the possession of these goods, convey them whither he would, put them in what store he pleased, and reclaim them anywhere anybody might carry them, either with or without his approval?

Thus fortified, the plaintiff commenced his action against the sheriff—brought trespass, which is the proper remedy, *Grennell* v. *Philips*, 1 Mass. R., 530, and the jury gave in damages the value of the goods when taken, *Smith* v. *Putney*, 18 Maine R., 87, being governed, as it seems, by the appraisers' valuation.

But the judge instructed the jury that the mortgage covered whatever goods were taken by the defendant from the second store which were in the first. The finding of the jury under this instruction leaves no ground for a question of the kind raised, and this ends the talk about the exceptions.

There is another question raised about the admission of Wheelden, senior, to state what his real intentions were, in taking the mortgage. I do not care to discuss whether a party witness, if permitted by law to testify at all, shall or shall not be permitted to testify directly as to his intentions about which he is supposed to know—when his intentions are all that is necessary to be known, and to find out which, all testimony is directed in such a suit, because if the mortgagee did not take the mortgage with the intention in whole or in part, to defraud creditors, then no matter who else had that intention, or what other element enters into the case.

The question raised by the motion and report pertains wholly to the matter of fraud, as that was the defence relied on by the defendant.

On this point the testimony of both the Messrs. Wheelden, and especially the Wheelden senior, was so fair, clear and distinct, and truthful, as to the father being a *bona fide* creditor of the son—as to the son's intention to secure his father,

to go along and close up his affairs, and pay all his debts, and as to the father's intention and honest purpose only to secure himself, and not to assist his son to delay creditors, only so far as it must be incidental to his securing himself, was perfectly satisfactory to the jury, and will be so to this court.

RICE, J. The plaintiff presented himself as a witness upon the stand in his own behalf, and was permitted by the court, against the objection of the defendant, to answer the following interrogatory, proposed by his counsel: "What was your motive in taking the mortgage?" The validity of the mortgage, with reference to which this inquiry was made, was a material fact in issue between the parties. It was assailed by the defendant on the ground of fraud. Whether it was fraudulent, so far as the plaintiff was concerned, depended entirely upon the intent or motive with which he received it. If it were received for the honest purpose of securing a debt due from the mortgager, or to protect himself from liabilities which he had assumed for the mortgager, and for no other purpose, the law will uphold it. But if taken by the plaintiff for the purpose of aiding or assisting the mortgager to defraud or delay his creditors, or if such purpose constituted any part of the motive which induced him to take the mortgage, then it was fraudulent and void as to creditors. The question of motive or intention was a question of fact, to be determined by the jury. Ordinarily such facts can only be proved by circumstantial evidence, for the obvious reason that no living witness can absolutely *know* the motives which influence or govern the conduct of others. The secret thoughts and intentions of men are *known* only to themselves and to God. Hence the necessity of inferring from surrounding circumstances the motives which govern human conduct, and give character to the acts of man.

In all cases it is desirable to have direct and positive testimony, where it can be obtained. The law requires parties to produce the best evidence which the nature of the

case will admit, and witnesses are required to state all facts within their knowledge which are pertinent to the issue to be determined.

Was the fact to which the interrogatory referred competent to be proved and pertinent to the issue then before the jury? And if so, was it within the personal knowledge of the plaintiff? Most clearly so. It was the material fact in the case, and this witness alone had positive personal knowledge upon that point.

The objection that to admit the testimony would hold out strong inducements to parties to commit perjury, addresses itself to the legislature rather than to the court. Parties being witnesses must testify subject to the same general rules as other witnesses, unless restricted by the power by which they have been permitted to testify.

No error is perceived in the ruling of the judge as to the description of the goods in the mortgage. Moving them from one store to another could not destroy the mortgagee's right to them, though it might render it more difficult for him to identify them as the goods covered by his mortgage. The burden of proving the identity was upon him; if he failed, the defendant could not be injured thereby.

The motion presents more serious difficulties. The mortgager, called by the plaintiff, testified, among other things, as follows: "I was fearful somebody might strike. I put them (the goods) so that I might keep my stock, so that no one could jump upon me. I made the mortgage so that one should not get the whole, and the rest get nothing. I told father when I had his name that if I saw any chance for trouble I would so secure him that he would lose nothing by being security for me. I did not know but some one might strike. I was afraid some one might attach, so I put it in a shape so that I could make an equal distribution."

This testimony, and there is much more of similar import, proves the transaction fraudulent on the part of the mortgager, past all doubt. Did the mortgagee have knowledge of and participate in, or assent to the fraud. He testifies that

in his participation in the transaction he had no fraudulent intention. The mortgager, referring to the testimony above recited, says, "this is the conversation had with father," and again, this witness, in speaking of the plaintiff, says, "he thought a year would be sufficient in which to fix up my matters."

The plaintiff also testified, "My son has told the truth as to the transaction, and I could not state it any differently from what he has." "He said, when he came down that morning, that he was owing a number round about, and he did not know but what some of them might make trouble or costs; he told me how it was; he thought it was best to come up and have a mortgage made. Don't know whether he or I got the mortgage made; can't say who paid for the mortgage; can't say who paid for recording; think he did."

The transaction was surrounded with many circumstances, not conclusively proving fraud, it is true, but which have ever been looked upon with suspicion, as indicating a fraudulent intent.

Thus the transaction was between near relatives—father and son; the transfer was in gross, and of all the visible property of the mortgager; no account of stock was taken; no change was made in the actual possession of the property mortgaged; the business was carried on in the same manner after as before the mortgage; no settlement was made by which the respective rights of the parties were determined; the mortgager was deeply embarrassed and in constant apprehension that his creditors would attach his goods, which fact the plaintiff well knew, as he did the motive which induced the mortgager to act.

These facts and circumstances, in our judgment, overcome the denial of the plaintiff of a fraudulent intent on his part.

It may not have been the intention of either the mortgagee or the mortgager to perpetrate a moral fraud; they may have intended to act for the benefit of all the creditors of the mortgager; but that they both intended to place the property mortgaged beyond the reach of legal process, and

thereby to delay, if not to defeat, creditors, we think the case clearly shows. This constitutes a legal fraud.

The exceptions are overruled, but the motion is sustained, and a new trial granted.

JOSEPH C. WHITE ET AL. *versus* VALENTINE ESTES ET AL.

Where a debtor, having given a bond in the usual form, attempted to disclose, but did not complete his disclosure, and thereupon, within six months from the date of the bond, surrendered himself to the custody of the jailer, and went into close confinement, the penalty of the bond is saved.

If the debtor is improperly discharged by the jailer, the forfeiture of the bond is saved nevertheless.

This action, which is debt on a poor debtor's bond, comes before the full court on REPORT of APPLETON, J.

The plaintiff introduced a paper purporting to be a true copy of the record of the magistrates, before whom the debtor commenced his disclosure, on July 6, 1854, and an alias execution with the officer's return thereon.

The defendant then called D. D. Stuart, who testified, subject to objection, that the debtor commenced his disclosure, and after proceeding four days, declined further disclosing, the disclosure being at the creditor's request taken in writing, on questions propounded to and annexed by him in writing. That the witness moved the magistrates to adjudicate that the creditor have a lien on all the property disclosed by the debtor; that the magistrates said they did so adjudicate at the time; that he did not recollect that he saw any record of the adjudication; that questions were put and answers made by the debtor, and reduced to writing; that in the winter of 1857 he extended the record from this memorandum, and the justices certified it as a true copy of the

record, which paper is the identical paper introduced. That he took his minutes of the property disclosed, from the questions and answers in writing; that there was a citation and entry before the magistrates, and the questions and answers were in writing, and minutes were made upon the citation; that he called on the magistrates for a copy of the record; that he drew it out *in extenso*, at their request, as aforesaid; that he did not see any certificate made by the magistrates, at the time, nor since, to his recollection. That the disclosure was not signed by the debtor, and he did not offer to sign it, nor claim to have the oath administered, nor was it administered. The plaintiffs seasonably objected to the introduction of all parol testimony, to affect the record of the justices.

The court are to render judgment for the defendants, if, on the evidence which is legally admissible, the defence is made out. If the evidence fails to establish a defence, the damages are to be assessed by the court or the jury, as the parties may prefer; the court having power to draw such inference as a jury would be authorized to draw.

D. D. Stuart, counsel for the plaintiffs.

1. The debtor attempted, in the first place, to disclose; and after proceeding more than three days refused to complete the disclosure, having satisfied himself that the justices would refuse the oath by reason of his countless and glaring frauds. And the justices did, in fact, refuse to administer the oath.

2. But the court was properly organized—the debtor selecting one justice and the creditor the other—and after the disclosure was commenced neither party could revoke the authority of the justices, or deprive the other of any rights acquired under the proceedings. *Ayer* v. *Woodman*, 24 Maine R., 196; *Chamberlain* v. *Sands*, 27 Maine R., 468.

3. The debtor disclosed, as the case shows, a large amount of attachable property, and the creditor's lien thereon in-

stantly attached, and the refusal of the debtor to sign the disclosure could not defeat it. R. S., ch. 148, s. 34; *Jewett* v. *Rines et al.*, 39 Maine R., 9.

Within thirty days after the disclosure a demand was made on the debtor for the property by an officer holding an alias execution, and the debtor refused to deliver it. This was a breach of the bond. *Hatch* v. *Lawrence*, 29 Maine R., 480; *Collins* v. *Lambert*, 30 Maine R., 185; *Torrey* v. *Berry*, 36 Maine R., 589; *Jewett* v. *Rines*, 39 Maine R., 9.

A. W. Paine, counsel for the defendants.

The bond declared upon is subject to three conditions of performance, and all that the defendants are bound to do is to perform one of them, whichever they elect. Upon performance of either of these conditions the bond is saved. This was directly adjudged in *Pease* v. *Norton*, 6 Greenl. R., 229; also affirmed in *Rollins* v. *Dow*, 24 Maine R., 124, where the court say, "If either of the conditions has been performed the defence is made out." Also, in *Fales* v. *Goodhue*, 25 Maine R., 425, where the court held the debtor responsible to perform only one of the conditions of the bond.

The bond is a contract *in the alternative*, in which case the obligor or promissor has his election to perform whichever condition he may please. 2 Parsons on Con., 163 and 169.

The defendant, having delivered himself up to the jailer according to the bond, his duty is thus performed. If the jailer failed in his duty in discharging or keeping him, that was his fault; the error, if any was committed by him, cannot be visited on his surety upon the bond. And proof *by parol* is sufficient, without record of the delivery up to the debtor. *Rollins* v. *Dow*, 24 Maine R., 123, 125.

GOODENOW, J. This is an action of debt on a poor debtor's bond, dated June 10, 1854. Plea, the general issue and performance.

On the part of the defendants, Josiah S. Witherell testified, that he was keeper of the county jail at Norridgewock, in the county of Somerset, in November, 1854; that Valentine Estes delivered himself into his custody, as jailer, November 24, 1854, and went into close confinement, and so remained in jail, till the 8th of December, 1854, when he was discharged for non-payment of his board. Said Estes surrendered himself on the bond in suit, which, with the execution, were filed with said Witherell, as jailer, on said 24th of November, 1854.

The plaintiffs contend that the debtor having, before this surrender of himself to the custody of the keeper of the jail, attempted to disclose, and after proceeding more than three days in the examination and disclosure, having refused to complete the same, (the court having been legally organized,) and having disclosed a large amount of property liable to attachment, the plaintiffs thereby acquired vested rights under that proceeding; and having made his election, to submit himself to an examination within six months, according to the terms of the condition of the bond, could not abandon those proceedings, and relieve himself and his sureties on the bond, by delivering himself into the custody of the keeper of the jail, and going into close confinement, within six months from the date of said bond.

The bond declared on is subject to three conditions. The defendant must take care to perform one of them within six months, if he would protect himself and his sureties. *Rollins* v. *Dow*, 24 Maine R., 124; *Fales* v. *Goodhue*, 25 Maine R., 425.

If, after having delivered himself up to the jailer, and gone into close confinement, the defendant was discharged by the jailer, improperly, still the forfeiture is saved, and the plea of performance established.

The cases cited by the counsel for the plaintiff, are those in which the debtor endeavored to relieve himself by his disclosure, and failed to do so, on account of some irregulari-

ties in the proceedings; and not cases in which he surrendered himself and went into close confinement, and therefore materially unlike the case at bar.

We are of opinion that a nonsuit must be entered, and the defendants must have judgment for their costs.

ELIZABETH A. GREENE *versus* NAHUM GODFREY.

Where both parties to a contract have violated the law in making it, neither party can invoke the aid of the law to repudiate it.

Where a contract is fully executed on the Sabbath, and the property passes, the sale is nevertheless valid.

A deed executed on Sunday cannot, for that reason, be avoided by a third party who is a stranger to the transaction, claiming by a subsequent levy.

No evidence can be received to contradict the certificate of acknowledgment for the purpose of making a deed ineffectual.

EXCEPTIONS to the ruling of CUTTING, J., presiding.

The action is ejectment for a certain lot of land, situated in Oldtown.

Both parties claimed title under one Charles H. DeWolfe. The plaintiff, to support her title, introduced a writ, in her favor, against said DeWolfe, dated February 11, 1853, on which was returned an attachment of said DeWolfe's real estate, made on the same day.

Also, the judgment of this court, rendered thereon at the October term, 1854, and execution, duly issued January 11, 1855, and the officer's return of a levy on the demanded premises, within thirty days after judgment, and the certificate of the record of said levy on March 10, 1855, within the time required by law.

In defence the defendant introduced, subject to objection, a deed to himself from said DeWolfe, dated November 1, 1852, acknowledged December 18, 1852, and received December 20, 1852.

Also, Robert F. Kinsell, the subscribing witness, who testified to that fact, and that his signature was genuine; that he took the acknowledgment of said DeWolfe at the same time he subscribed as a witness, on Sunday, the nineteenth day of December, 1852, at the request of said DeWolfe; that he examined the deed and found the blank acknowledgment filled up, corresponding with the date of the deed, which original date of acknowledgment he erased and substituted in its place the date as it now appears, that he remarked to the parties that the deed ought not to appear to be acknowledged on the Sabbath day; that thereupon, at their request, he took the acknowledgment on said Sabbath, December 19, and dated it back one day, to the 18th December, 1852. Hereupon the judge instructed the jury, that, if they believed the testimony of the witness, they should return their verdict for the plaintiff, which ruling and admission of testimony was *pro forma* for the purpose of presenting those questions to the full court.

A. Knowles and *J. H. Hilliard,* counsel for the plaintiff.

E. Kent, counsel for the defendant.

TENNEY, C. J. Charles H. DeWolfe is the source of title as it is claimed by each party; that of the tenant under the deed to him from DeWolfe is earlier than that under the levy on the execution in favor of the demandant against him. But the deed is denied to be valid, on the ground that it was made in violation of R. S., ch. 160, s. 26, prohibiting the transaction of any business on the Lord's Day, works of necessity and charity excepted, and therefore void.

It was proved that a person met the parties to the deed, on Sunday, December 19, 1853, that it was produced; that at the request of the grantor therein, he signed it as a subscribing witness; and that he made a certificate thereon, as a justice of the peace, that the grantor made acknowledgment thereof before him. The date of the certificate is December 18, 1853.

If the law was violated, by the acts, in reference to the deed, the grantor and the grantee, having full knowledge of those acts, participated therein. The deed was fully executed; it was, upon its face, sufficient to pass the premises in controversy from one to the other, without any further act from either, or from the courts. It was unlike a contract executory in its character. In the latter, the party bound to perform a duty, therein undertaken, may omit the performance, with impunity, till a court shall give its aid in a judgment. The law does not lend itself to afford this aid where both parties to the contract have violated the law in making it. This distinction is fully recognized in the case of *Worcester* v. *Eaton*, 11 Mass. R., 368. The doctrine is fully affirmed in *Ellis* v. *Higgins*, 32 Maine R., 34, which was a writ of entry by the grantee against the grantor of the land described in the deed. It was defended on the ground, that the deed was made and was recorded fraudulently, to secure the premises from the grantor's creditors. And in argument, the case was likened to agreements made upon the Sabbath. SHEPLEY, C. J., in delivering the opinion of the court, says, "The counsel does not notice the distinction between executed and executory contracts. If a contract was executed and the property passed on a Sunday, the sale would be valid."

In the case before us, the demandant was a stranger to the unlawful conduct of the parties to the deed, at the time when it was witnessed, and the grantor acknowledged it, and can she be allowed to impeach it on that account, though as between the parties, it was effectual as a conveyance? The opinion, which was expressed by the judge at the trial, for the purpose of having the question of law there raised, presented to the law court for determination, was upon the ground exclusively, that the attempted conveyance being completed on Sunday, was inoperative. The question whether the deed was fraudulent against creditors of the grantor, under the statute of 13 Elizabeth, ch. 5, was not presented, and no evidence was adduced for the purpose of proving

such a fraud. If that had been the issue, proof of the fraud would have vacated the deed, if not made on a Sunday, and being perfect in all the forms required by law.

As the case was presented, the demandant acquired no rights by her levy, which she would not have obtained under a deed from her debtor, in consideration of the extinguishment of her debt, and none greater than he had at the time.

The question is raised, whether it was competent for the demandant, against the objection of the tenant, to prove that the date of the certificate of acknowledgment upon the deed was false, and that it was actually made upon the Sabbath.

The R. S., ch. 91, provide, that real estate may be conveyed by a deed of the owner thereof, acknowledged before a justice of the peace, &c., and his certificate of the same indorsed on or annexed to the deed, and the deed and certificate recorded in the registry of deeds; and that no conveyance of real estate shall be good and effectual against any person, other than the grantor, his heirs, and devisees, and persons having actual notice thereof, unless it is made by a deed, recorded as provided in this chapter. The sum of these provisions is, that a deed, having this evidence of the acknowledgment of the grantor upon it, or annexed to it, and being duly recorded, will pass the real estate described therein to the grantee from the grantor. If it have not this evidence, save in certain excepted cases, the estate described therein does not pass, and the deed is inoperative. It follows, that no evidence, to show that the certificate of acknowledgment is untrue in any respect, for the purpose of making the deed ineffectual, can be received; it would be in direct conflict with the effect which the statute declares. This principle is embraced in the numerous cases cited by the counsel for the tenant. This case is perfectly analagous to the certificate of a magistrate upon a deposition taken by him, and by the certificate of two justices of the peace and the quorum, that a debtor has taken the oath prescribed in the statute.

It is no less a contradiction of the certificate, to prove the date erroneous, than to show any other falsehood therein. The testimony of the magistrate, who made the certificate, is not distinguishable in principle from the testimony of another witness, who had knowledge of the same facts. Both are incompetent.

According to the agreement of the parties, the action must stand for trial.

INHABITANTS OF STETSON *versus* INHABITANTS OF CORINNA.

Pleas in abatement to the jurisdiction are to be filed within the two first days of the term at which the action is entered.

The recognizance taken before the magistrate on an appeal must be returned to the court to which the appeal is taken.

Where no recognizance is returned when the appeal is entered, it may be received and entered of record by leave of court, after a motion to dismiss for that cause.

The records of the court are not completed in respect to any action till final judgment is rendered.

A *copy* of a recognizance should not be returned to court, and cannot be entered of record; neither is a copy admissible to contradict an original, or show it defective.

It is not necessary to show jurisdiction in the Supreme Judicial Court, for it will be presumed until the contrary appears.

A motion to dismiss for want of jurisdiction, after verdict, may be treated as a motion in arrest of judgment.

No motion in arrest of judgment, in any civil action, can be sustained by the statute of this state.

EXCEPTIONS were taken to the rulings of APPLETON, J., at *Nisi Prius*.

This is an action of assumpsit, to recover for supplies furnished a pauper. It was commenced originally before a justice of the peace. The defendant appealed from that judgment.

The action was entered in this court, and a verdict rendered for the defendant. It was continued on motion for a new trial, on the ground of newly discovered evidence, when, upon full argument, that motion was overruled. Before the motion was overruled, the plaintiff filed a motion that the case should be dismissed for want of a proper recognizance. The motion to dismiss was made on the day of the hearing of the motion for a new trial.

At the hearing of this motion, it appeared that among the papers filed in the case when it was entered in court, was a certain paper indorsed, "Copy Recognizance Stetson v. Corinna." This paper, after reciting the facts therein stated, as to trial, and that the persons therein named had acknowledged themselves indebted to the plaintiffs, in usual form of a recognizance as there appears, concluded as follows: "And said defendants having claimed an appeal from said judgment, to the Supreme Judicial Court for the Eastern District, next to be holden at Bangor, in said county of Penobscot, on the first Tuesday of April next. Now, therefore, if the said defendants shall appear at the court aforesaid, and shall prosecute their appeal with effect, and shall pay all intervening damages and costs, then this recognizance shall be void; otherwise remain in full force and virtue.

Record attest:

DAVID BARKER, *Jus. Peace.*

Copy attest: DAVID BARKER, *Jus. Peace.*

There was also filed at the time of entry in court, a paper purporting to be a copy of the record in the case.

The counsel for the defendant suggested a diminution of the record of the judgment, and asked leave to file an amended record, which was granted.

The defendant, at this hearing of the motion, asked leave to file a paper purporting to be a recognizance in this case of the same date and parties as the one first described, and reciting the proceedings in this case before the said justice, and the appeal taken, the conclusion of said paper being as

follows: "Now, therefore, if the said defendants shall prosecute their appeal with effect, and shall pay all costs arising after their appeal, then the recognizance shall be void; otherwise remain in full force and virtue.

Attest: DAVID BARKER, *Jus. Peace.*"

The presiding judge allowed the said motion for leave to file said paper, to which the plaintiffs excepted.

The defendants also asked leave to file a paper purporting to be a record of the proceedings before said justice, and of his judgment in this case, which was allowed, the plaintiffs excepting to such allowance.

Thereupon the presiding judge overruled the motion of the plaintiff, to dismiss the action.

To which ruling and order the plaintiffs excepted.

E. Kent, counsel for the plaintiffs.

The motion to dismiss for want of proper recognizance, was improperly overruled.

There was no proper recognizance in this court. Action was entered as an appeal from a justice of the peace, April term, 1854; at that time the only paper filed as a recognizance was a paper referred to as minuted, a copy of recognizance.

Without a proper recognizance the appeal cannot be sustained. *Hilton* v. *Longley*, 30 Maine R., 220; *Dolloff* v. *Hartwell*, 38 Maine R., 54.

The recognizance filed was most clearly insufficient in condition.

It is *exactly* the same as in *French* v. *Snell*, 37 Maine R., 100, which was decided to be illegal because it required personal appearance, and more particularly because it held the party recognizing to pay intervening damages. That case settles the point, that the recognizance, or copy of recognizance, was *no* recognizance. For what purports to be a recognizance, if not in conformity with law, is void. *Harrington* v. *Brown*, 7 Pick. R., 232; *Owen* v. *Daniels*, 21 Maine R., 180.

It is clear beyond dispute that no recognizance was filed in this court which was a legal one. What purported to be a recognizance was filed, but like that in *French* v. *Snell* it was void—not being the one required by ch. 116, s. 10.

Was the motion made in season? I grant it was late, but I hold that whenever, in any stage of the case, before *final judgment*, it appears that the court *had not jurisdiction*, the appeal will be dismissed.

It was so, in fact, settled in the case we rely on—*French* v. *Snell*—for there the motion was not made until the action came on for trial. In *Dolloff* v. *Hartwell*, 38 Maine R., the motion was made at the second term. In *Hilton* v. *Longley*, 20 Maine R., the motion was not made, as it appears, until after the entry in the Supreme Judicial Court, and not until a hearing before the Law Court.

In *Smith* v. *Robinson*, 15 Met. R., 165, the court say, where there is a *want* of jurisdiction of the subject of the suit, neither appearance nor direct consent of the parties would give jurisdiction, and a *motion to dismiss may be sustained at any stage of the proceedings.*

Jurisdiction cannot be given, even by consent of parties. *Carlisle* v. *Weston*, 21 Pick. R., 536.

So the only question is, is this objection based upon want of jurisdiction. This court obtains jurisdiction only by an appeal, regularly made and entered, and a recognizance regularly and legally entered into, and returned into, court.

If there is no entry, of course no jurisdiction. If no recognizance, no jurisdiction, as settled in cases in 38 Maine R., and others cited.

Then it is clear that at the term and time of entry, and at all subsequent terms, including that at which the jury trial was had, and the motion for a new trial made, heard, and determined, and up to the last day of the last (April term,) and until after our motion, now complained of as too late, there was no jurisdiction of the cause in this court, nothing on the records or on the files from which a record can be made. And that the recognizance must be returned to, and

made a part of the records or on file. *Paul* v. *Newell*, 6 Maine R., 239; *Dodge* v. *Kellock*, 10 Maine R., 266; *Libbey* v. *Mann*, 11 Maine R., 344.

Then the only question is, whether the new papers offered on the last day, and allowed, change the aspect of the case. Was the judge right in allowing them to be filed, and if allowed to be filed on that day, did they give jurisdiction and justify the judge in overruling our motion.

Observe the exact facts—not a case of omission to file anything—not the case of a *lost* record. But the case where a record has been filed, and a recognizance—papers which, if correct, were the papers required—defendant now, at the last moment, proposes to withdraw these papers or to substitute others—or double them—to have *two* records —two recognizances—contradictory, with different conditions.

Defendant brings from the same justice a certified record and a certified recognizance—says, under his official certificate, these are true,—that, on the day named, a recognizance in this case was made and entered into before him, conditional, as therein set forth. These he files when he enters his appeal, and as the support of the jurisdiction of this court. Finding that this recognizance was void, he now asks to file another and different one, purporting to have been from the certificate of the same justice—does not ask to *withdraw* the others, but simply *files* one upon the others. He does not even call the justice to testify (if he might) as to which is true, but holds on to both, and asks the court not only to take jurisdiction now, but to decide that it has had jurisdiction all along, and from the commencement up to this time.

How can the court, on this state of facts, say which is correct? Why discard the first rather than the second? The first was made at the time, the last recently.

I ask attention to this simple view of the case. There either *was* or there was *not* a recognizance, legal, filed in the case when the appeal was entered. If what was filed was not a recognizance, according to law, then there was no

recognizance, and the court here had no jurisdiction, and all its proceedings have been void, for want of jurisdiction. This would clearly be so, if no paper had been filed. But defendant did undertake to file a recognizance and record. But if this recognizance is void, then there is no recognizance, and the appeal is vacated, and no jurisdiction attaches in this court.

It has been settled in numerous cases, some before cited —11 Maine R., 4 Mass., *Rynde* v. *Ford*,—that the recognizance must be returned to the court, and there made a matter of record, or filed, so that it is, in fact, or can be made, part of the record.

In order to give the court jurisdiction it must be returned at the term when the appeal is entered.

Is the recognizance necessary to to give jurisdiction? If it is, then it must be filed at the term appealed to. This court can only obtain jurisdiction of a justice case by an appeal; the appeal, as all papers show, was to the April term, 1854. My position is, that if this court did not obtain jurisdiction at that term, it could never obtain it at any subsequent term. For by s. 9, ch. 116, the appeal from a justice is to the *next* court. By s. 11, the appellant shall, at the District Court, produce a copy of the record, and *all* the papers filed in the case, "and if the appellant shall fail to produce such papers, and *enter* and prosecute his action, the the court may affirm the former judgment."

Now it is shown, as before, that this court, and courts in Massachusetts, have decided again and again that the recognizance must be filed.

The statute requires the papers to be produced *before* the entry of the appeal.

In an action against recognizors, it is clear that it must be alleged and proved that the recognizance was returned to the court, and if so, it must be to the term to which the appeal was taken.

The defendant appears at the last moment and asks to file another paper, called a recognizance. By the permis-

sion of the presiding judge we have two sets of papers, —two records and two recognizances—in the same case, and on the same appeal, from the same justice, and both certified by him. Suppose that an action was to be brought on the recognizance—which one? If on this last would it not be a defence to say, first, that it was not returned to the term at which the appeal was entered; and, secondly, that there were two records—two recognizances—on file, differing from each other. For be it remembered that the suit must be *based* on the recognizance as it appears on record in this court. We cannot go back to the justice's records—the records and files of *this* court only furnish the instrument declared on. This is clear from the cases before cited, 4 Mass., 11 Maine, &c. How could an action be sustained on one or the other. If suit is brought on the last, then here is a certificate of the same justice that there was a different one. If on the first, then here is a different one.

In *French* v. *Snell* the court held that the appeal was not perfected, by reason that the recognizance contained two provisions not authorized by law; and on motion of the plaintiff, *although the provisions were favorable to him*, the action was dismissed; and why? Because the appellee could *not enforce* it against the appellant and sureties. Now, how could anything be enforced in this case? If on the first recognizance, the answer is, that, according to *French* v. *Snell*, it is void. If the second is sued, the answer is, it was not filed in proper time; and, secondly, that the record shows two recognizances of the same date, and on the same action, and for the same appeal. There must be a recognizance put on file at the time of entry of the appeal, on which an action could be maintained by the appellee, and there can be but one. Appellee is not bound to select from a mass of pretended recognizances *at his peril*, one that may bind. He is entitled to have one, and but one.

To show that the law intends that the recognizance must be filed at or before entry, and before jurisdiction, in this

court attaches, I refer to the case of *Knight* v. *Bean*, 18 Maine R., 219, where the action was dismissed because the recognizance was not filed, within the ten days given by statute. Now, as was well said by Howard, for defendants, before that special statute of 1831, the appeal must have been perfected before adjournment — this law gave ten days. But the recognizance must be filed *within* the ten days. So here it must appear that the appeal was perfected by a recognizance within twenty-four hours. But here appears to have been two. But a legal recognizance must be filed in the appellant *court* at or before entry.

If the case *Commonwealth* v. *McNeil*, 19 Pick. R., is relied upon by the defendant, I answer to that, as touching this recognizance, it is distinguished in several most important particulars.

1. That was in a criminal case, and on a suit of *scire facias*—not a question of jurisdiction.

2. In that case a motion was made *at the time* or *term* of entry by the county attorney, suggesting that there was a diminution of the record, the recognizance returned not containing the *whole*, viz: omitting the *cause* of caption; and the motion was granted by the court. Here is no suggestion of any diminution of the record of the *recognizance*, only a suggestion, at the last moment, of a diminution of the record of the *judgment*, and leave asked to file an amended record of the *judgment* only.

As to the recognizance he suggests nothing, and merely asks to file a paper purporting to be a recognizance in this case, at the last moment.

3. But the great distinction is, that, in the case in Pick., it is a mere amendment or extension of the record, inserting a fact accidentally omitted, the record sent being *imperfect*, and amended from minutes on the docket, but *consistent*, and not contradictory.

The whole extent of that decision is, that where a part only of the record has been sent, and a part omitted, and the

part omitted can be supplied, provided there is something to amend by on the record or docket, and, also, provided that there is no contradiction or inconsistency.

For the reason given by SHAW, C. J., is in so many words: "The two papers produced in the present case are not inconsistent with each other; the difference is, one is a *fuller* statement of the transaction than the other, and being consistent with the truth of the case, which must be taken as true, and *returned at the term* to which it was returnable, it is to be taken as a valid recognizance."

Now this had no reference to the question of the jurisdiction of a court, and whether an appeal had been perfe ted, so that jurisdiction attached, but only whether the recognizance, which was certified into the Court of Common Pleas, merely to give a civil suit, was sufficient to sustain a civil suit.

But the great distinction, plain, palpable and decisive, is, that here the two papers are vitally, most essentially, inconsistent with each other; not a fuller statement, not an omitted statement, found on record, with the same condition, but totally diverse—a substitute, not an amendment, with conditions *which are different.*

The court, in Massachusetts, did not say, that, if the first recognizance had been perfect in form, that one entirely different in its conditions and requirements might be filed as a *substitute,* for it is clear that no minutes or records could show two entirely different recognizances in all essential particulars; and the reason why an amended recognizance may be filed, is, that there is a *diminution* of the record, not that there is a *contradiction* in the record, and that two contradictory recognizances can be set forth therefrom.

How stands this case? How can the court say which is the right record? The justice does not appear—his docket is not produced—he is not examined—both cannot be true.

In the case *State* v. *Maher,* 35 Maine R., the justice was allowed, on motion, to *complete* his record by adding another

fact, not to contradict, or withdraw and substitute a totally different one.

D. D. Stuart, counsel for the defendants.

The exceptions show that this case was tried originally before a justice of the peace, and the defendants appealed. The appeal was duly entered in this court, at the April term, 1854, and the case was continued from term to term, until January term, 1856, when it was tried, and a verdict was returned in favor of the defendants. No objection was made by the plaintiffs to the regularity of the appeal, or the correctness of any of the papers on file in the case. On the contrary, a motion was made for a new trial, on the ground of newly discovered evidence, and the case was again continued more than a year before a hearing was had upon said motion. During all this time, a period of more than three years after the appeal was entered in this court, no objection was made by the plaintiffs to its regularity, or to the form of any of the papers. And finally, a full hearing was had upon the motion for a new trial, and the motion was overruled. After all this, the plaintiffs come forward with a motion to dismiss for want of a proper recognizance.

1. The defendants say, first, that the plaintiffs cannot be allowed, *in this stage of the proceedings, to interpose any motion whatever* to prevent judgment being entered upon the verdict. In *Swett* v. *Stubbs*, 34 Maine R., 178, the court held that after exceptions have been filed and overruled, the prevailing party is entitled to judgment, and the case is no longer open to the introduction of testimony to prove any fact upon a motion to prevent judgment. In such case the party is *out of court*, and has no right to interpose any objection or motion to prevent judgment. It is not perceived why the same principle is not applicable to the present case. A *bill of exceptions* is, in its nature, simply a *motion for a new trial. Here* was a *motion for a new trial.* And when that motion was overruled, the plaintiffs were *out of court*,

and had no right whatever to interpose any motion to prevent judgment, or to offer any proof in support of it. We deny, then, any right of the plaintiffs *to make the motion* in that stage of the case.

2. The motion comes *too late.* Shall a party be allowed to lie by after an appeal is entered from a justice of the peace—go to trial on that appeal, without making any objection to its regularity—take his chance of obtaining a verdict, and after a verdict against him, file a motion for a new trial, and after his motion for a new trial is overruled, then, for the first time, object that the appeal was not regularly taken? If so, he might make the same objection *after* his *motion for a new trial had been sustained,* and a *second verdict* had been *returned against him.* None of the cases that are cited for the plaintiffs sustain any such proposition as this. The objection was taken *before going to trial, in every case cited.* We respectfully contend that the motion comes *too late. Lane* v. *Roberts,* 3 Gray R., 515.

3. It was no part of the duty of the defendants, as appellants, to bring up a recognizance. They were simply to produce "a copy of the record of the judgment of the justice, and of the papers filed in the cause." R. S., ch. 116, s. 11; *Holden* v. *Barrows,* 39 Maine R., 135.

The statute does not require the appealing party to produce a recognizance in the court above. It is no part of *his* papers, nor is it any paper necessary in the trial. If a recognizance is required by the appellee before an appeal is allowed, it is the *duty of the justice* to return it to the court appealed to. *Bridge* v. *Ford,* 4 Mass. R., 643; *Johnson* v. *Randall,* 7 Mass. R., 340; *Exparte Neal,* 14 Mass. R., 205; *Longley* v. *Vose,* 27 Maine R., 188.

But it is perhaps unimportant to determine whether the justice or the appellants should bring up the recognizance. Because, if it is the duty of the justice, he has performed that duty by sending up the proper recognizance, which is now on file. If it is the duty of the appellants, they have fulfilled it, by bringing the proper recognizance here at the

same term the plaintiffs made their objection, for want of one, and it has been filed by the leave of the court, among the papers in the case. It was time enough to file a recognizance, when an *objection* was made for *want* of one, there being no dispute that the proper recognizance was actually and seasonably entered into.

4. Whether an appeal has or not been properly taken, must be proved by the record of the judgment of the justice, before whom the cause was tried below. In the present case, both the original and the amended record show that an appeal was properly taken. And this record is conclusive evidence of the appeal. No other proof will be received to show the appeal—none other to disprove it. *Gammon* v. *Chandler*, 30 Maine R., 154; *Moody* v. *Moody*, 2 Fairf. R., 247; *Harris* v. *Hutchins*, 28 Maine R., 102; *Paul* v. *Hussey*, 35 Maine R., 97; *Dolloff* v. *Hartwell and al.*, 38 Maine R., 54; *Holden* v. *Barrows*, 39 Maine R., 135. In this last case, SHEPLEY, C. J., says, "The record (of the justice) is not liable to be explained or contradicted by parol testimony, or *extraneous documents*. A copy of the record, regularly authenticated, is the legal and best evidence of it." The form of the recognizance cannot affect the record.

The magistrate had authority to amend the record and recognizance. *State* v. *Maher*, 35 Maine R., 225.

5. But the case finds that the appellants did properly appeal, properly recognize, and the proper recognizance is on file. The statute points out no particular time when the recognizance should be filed. It is sufficient if done any time while the action is pending on the docket.

APPLETON, J. Pleas in abatement to the jurisdiction are to be filed within the two first days of the term at which the action is entered.

The plaintiffs, having obtained judgment in the court below, an appeal was taken, the action entered in this court and continued several terms, when it was tried by the jury and a verdict found in favor of the defendants. After the

verdict, and after several motions for a new trial by the plaintiff's counsel, had been made and overruled, a motion to dismiss, on account of defects in the recognizance, was filed, which, being overruled, exceptions to this ruling of the presiding justice were duly alleged.

The record of the magistrate shows that a recognizance was entered into, and that an appeal was duly taken.

The recognizance taken before the magistrate on an appeal, must be returned to the court to which the appeal is taken. It is there entered of record, and becomes the basis of further proceedings therein. "The recognizance should have been returned to the Court of Common Pleas, to which court the appeal was made, and there filed as a record of that court, upon which the action should have been brought." *Bridge* v. *Ford*, 7 Mass., 209; *Bridge* v. *Ford*, 4 Mass., 641; *Dodge* v. *Kellock*, 10 Maine R., 266.

No recognizance seems to have been returned with the papers when the appeal was entered. After the motion to dismiss was made, the recognizance taken by the magistrate was returned, and, by leave of court, entered of record. It is in due form, and purports to have been legally taken. As soon as the objection was taken that there was no recognizance, it was at once removed by the production of what purports to be, and in the entire absence of legal evidence to the contrary must be regarded as the original. The plaintiffs have been in no respect injured by reason of its not having been sooner filed.

The records of the court are not completed in respect to any action till final judgment is rendered. It will be the duty of the court to see that the recognizance in this case is entered of record.

The defendants, among other papers, at the entry of the action, filed "a copy of the recognizance," duly certified by the magistrate to be a copy of record. This copy is defective, and variant from the requirements of the statute. If the copy had shown the recognizance to have been ever so formal, it still should not have been returned to this court,

nor could it be entered of record here. Neither is a copy admissible to contradict an original record, or to show it defective or informal. The copy of the recognizance can therefore legally have no bearing in the question before us.

The recognizance having, by leave of court, been filed, and thus become a part of the records of the court, and being in due form, shows that the court had jurisdiction in fact, and having jurisdiction, no reason is perceived for disturbing the proceedings.

The cases cited, and relied upon by the learned counsel for the plaintiff, are not in point. In *Hilton* v. *Longley*, 30 Maine R., 220, there was no recognizance taken. In *French* v. *Snell*, 37 Maine R., the original recognizance was fatally defective. In *Dolloff* v. *Hartwell*, 38 Maine R., 55, there was no recognizance taken.

No case has been cited to show that a recognizance may not be filed after the first term, by leave of court, or that, if filed, it may be contradicted or impeached by what purports to be a copy of the same.

This is a court of general jurisdiction. It is not necessary to show jurisdiction, for it will be presumed till the contrary appears. *Wright* v. *Douglas*, 10 Barb., 97.

The motion in this case may, perhaps, be regarded as in arrest of judgment. "Judgment will be arrested if it appear that there was no writ or process to give the court jurisdiction, but that proceedings have been carried on by consent. If an action, local in its nature, be sued in the wrong county, judgment will be arrested." Howe's Prac., 535; 1 Sell. R., 501; 7 Mass., 353. So a motion to dismiss for want of jurisdiction was treated as a motion to arrest judgment, and it was arrested in *Com.* v. *Emery*, 11 Cush., 406.

But if this be a motion in arrest of judgment, then the R. S., ch. 115, s. 80, by which it is enacted that "no motion in arrest of judgment shall be sustained in the Supreme Judicial Court or District Court in any civil action," expressly prohibits its allowance, and leaves the party to his remedy by writ of error, as in *Jordan* v. *Dennis*, 7 Met. R., 590.

In Massachusetts, it is true, the motion to dismiss for want of jurisdiction has been repeatedly sustained after verdict, as in *King* v. *Denny*, 11 Cush. R., 218, where an action of replevin for goods of less value than twenty dollars, was dismissed after verdict for this cause. In *Elder* v. *Dwight Man. Co.*, 4 Gray, 201, the motion to dismiss was made upon appeal from a magistrate, and sustained. In that state the statute prohibiting motions in arrest of judgment expressly excepts objections to the jurisdiction, and this, says SHAW, C. J., in the case last cited, "carries a strong implication that all such objections may be taken at any time before or even after judgment." The statute of this state is most general, and has no exception as to jurisdiction, as is the case in Massachusetts.

The objections taken cannot prevail. The plaintiff omitted or neglected to take exceptions to the defendants' standing in court, when, if not removed, they would have been available, and submitted to the jurisdiction of this court until after a verdict was rendered against him, and after his repeated motions for a new trial were overruled as without legal foundation. He cannot now be permitted to arrest the judgment of this court, especially where it is manifest it had jurisdiction.

Exceptions overruled.

GOODENOW, J. Any party, aggrieved by the judgment of a justice, may appeal, &c. R. S. ch. 116, s. 9.

Before such appeal is allowed, the appellant shall recognize with sufficient surety or sureties to the adverse party, *if required by him*, in a reasonable sum, with condition to prosecute his appeal with effect, &c. S. 10.

The record shows that the appeal was allowed. It does not show that the adverse party required a recognizance. *Ei incumbit probatio qui dicit, non que negat.* There would be no reason for a recognizance without sureties. It would not add to the security of the appellee. A recognizance is not made a condition precedent to an appeal, unless it is

claimed or required by the appellee, in cases *before justices of the peace.* There has been no trial by jury. The right of appeal should not be unnecessarily burthened. *The punctuation deserves marked attention.*

In appeals from the District Court to the Supreme Judicial Court, a recognizance was a condition precedent. R. S., ch. 97, s. 14. It did not depend upon its being *required* by the adverse party. So of prior statutes.

In *Dolloff* v. *Hartwell and al.*, 38 Maine R., 54, this distinction does not seem to have been noticed by counsel or the court. The opinion is very brief, and refers to *Gammon* v. *Chandler*, 30 Maine R., 54, which simply decides, that the record of the justice that there was no appeal, was conclusive. And also to *Hilton* v. *Longley*, 39 Maine R., 220, which was an appeal from the *District Court*, and not from a justice of the peace, as in this case.

By statute of Mass., March 11, 1784, vol. 1, p. 149, the party aggrieved by the judgment of a justice of the peace, in a civil action, could appeal; but before his appeal could be allowed, he was obliged *absolutely* to recognize, &c.

In criminal cases it was the same.

Mass. Laws, vol. 1, p. 160, s. 3. The cases decided under these provisions are inapplicable to the present case. The presumption is, that every man does his duty, when acting officially and under oath, till the contrary appears. Recognizances are only made necessary by statutes. A defective recognizance, where none is required, would not destroy the appeal. It would not deprive this court of jurisdiction in the case, after it had once passed from the jurisdiction of the magistrate, and had been duly entered here.

If there had been an error or omission in the record of the justice, such as omitting to insert that a recognizance was required by the appellee, the exception should have been taken at the first term. There will be no error apparent on the face of the record, if this court should render judgment in the case; as it will not appear that a recognizance *was required.* If the party did actually recognize be-

fore the appeal was allowed, the appeal was legal. The filing the recognizance in this court is not a condition precedent.

The defect in the recognizance is not that it is deficient, but that there is surplusage in the condition, requiring more of the defendants than the law requires. This was no doubt an error of the magistrate in a mere matter of form. The plaintiff had the security of the whole town without a recognizance, and there was no good reason why he should have required sureties. When a criminal is required to furnish a recognizance to do what the law does not require him to do, *he* may well object that he was in duress *pro tanto*. A recognizance cannot be waived in a criminal case. It may be otherwise in civil cases, for very good reasons; but "sufficient unto the day," &c.

The court had jurisdiction of the subject matter in this case, if it was legally appealed and taken out of the jurisdiction of the justice; and in my opinion the justice should have an opportunity to correct his record, according to the truths of the case, if it needs any correction. The defendants are not in fault; the plaintiff is not injured; he has taken his chance, had a fair trial, and the result upon the merits is against him. If the defendants cannot now have judgment on the verdict, I shall lament the magical force of the merest forms. R. S., ch. 97, s. 14, 17.

MELINDA BENT, *Executrix, versus* LEVI R. WEEKS ET AL.

The Court of Probate has jurisdiction of the assignment of dower and sale of the reversion, and where no question is made concerning the regularity of the proceeding and no appeal taken, the decree of that court is final.

A tenant in dower, after the termination of the estate, is not entitled to betterments under the provisions of the statute of 1843, ch. 6, where he is not the assignee or grantee by deed, of or from the tenant, of the life estate.

REPORTED by APPLETON, J.

This was a WRIT OF ENTRY, originally commenced by William G. Bent, the plaintiff's testator, who died pending the suit, and the plaintiff, whose capacity as executrix is admitted, comes in to prosecute. A tract of land is demanded, on the northerly side of Mill street, in Orono, and a claim is set up for rents and profits.

Both the plaintiff and Levi R. Weeks claim through Henry Sleeper, late of Orono, deceased, who died at Orono on the last of January, 1856, owning the demanded premises.

Rowe & Bartlett, counsel for the plaintiff.

The decree of the Judge of Probate, awarding dower to Lucinda Sleeper, and the license to the executors to sell the reversion of the widow's dower in the land demanded, are conclusive, the matters being within the jurisdiction of the Probate Court. *Potter* v. *Webb*, 2 Maine R., 257; *Leavitt* v. *Harris*, 7 Mass. R., 292; *Perkins* v. *Fairfield*, 11 Mass. R., 227; *Heath* v. *Welsh*, 5 Pick. R., 140–4.

The facts which the defendants offer to prove are inadmissible.

The defendants' claim of betterments is not allowable.

Their possession has not been adverse, as is necessary. *Comings* v. *Stuart*, 22 Maine R., 110; *Mason* v. *Richards*, 15 Pick. R., 141. A reversioner cannot lose his rights by adverse possession in a stranger, during the continuance of the particular estate. 1 Hill. Abr., 555.

One holding an estate in dower under the widow, cannot, after the termination of the estate, set up a claim for betterments against the reversioner. *Maddocks* v. *Jellison*, 11 Maine R., 482.

The defendants do not bring themselves within the provisions of ch. 6 of acts of 1843, March 4.

N. Wilson, counsel for the defendants.

HATHAWAY, J. In pursuance of proceedings in the Probate Court, the demanded premises were duly assigned to Lucinda Sleeper, as her dower in the estate of her deceased

husband, Henry Sleeper, and the reversion of her dower was duly sold for payment of his debts, and conveyed to William G. Bent, the demandant's testator.

Lucinda Sleeper died before the commencement of this suit.

The tenants attempted to defeat the title of the demandant's testator, and for that purpose offered to prove that said Lucinda was never the lawful wife of Henry Sleeper.

The Probate Court had jurisdiction of the matters of the assignment of dower and the sale of the reversion. No question is made concerning the regularity of the proceedings in that court, and no appeal was taken from its decrees, which, therefore, are *conclusive.*

The tenants are not entitled to betterments.

They cannot avail themselves of the provisions of the statute of 1843, ch. 6, for they were not, and do not claim to have been, "the assignees or grantees, by deed, of or from the tenant of the life estate (Lucinda Sleeper) or her heirs-at-law, or legal representatives."

As agreed by the parties, a default must be entered.

WILLIAM COLBURN AND AL. *versus* PEOPLES M. GROVER AND AL.

By the common law, the plea of *nul disseizin* so far admits the demandant's claim to the freehold, that he need not prove the tenant's possession.

The possession of the demanded premises by the tenant, is admitted by the plea of the general issue.

The plea of nontenure is required to be in abatement and not in bar.

The disclaimer allowed to be filed by way of brief statement under the general issue must "be filed within the time required for filing pleas in abatement, and not after, except by special leave of the court, and on such terms as the court shall direct."

On REPORT by APPLETON, J.

This action is brought to recover possession of lots No.

33 and 34, situate in the town of Lagrange. The plea was the general issue by both jointly, with a separate brief statement by Peoples M., disclaiming lot No. 34. Also, a separate brief statement by said George R., disclaiming lot No. 33, but admitting the possession of and claiming to own No. 34. And said Peoples M. admits the possession and claims to own No. 33. The pleadings were filed at this, the fifth, term. The plaintiffs claim both lots by levy on execution, in their favor, against the same defendants, made August 14, 1855, and duly recorded, and not invalidated. The date of the attachment was June 16, 1852, and both lots were levied upon as the property of said Peoples M. Grover.

N. Wilson, counsel for the plaintiffs.

A. Knowles, counsel for the defendants.

APPLETON, J. By the common law, the plea of *nul disseizin* so far admits the tenants' claim to have the freehold, that it is not incumbent on the demandant to prove the tenants' possession. *Burridge* v. *Fogg*, 8 Cush. R., 183; *Higbee* v. *Rice*, 5 Mass. R., 352. The possession of the demanded premises by the tenants is admitted by the plea of the general issue.

By R. S., ch. 145, s. 9, "by a brief statement under the general issue, the defendant may show that he was not in possession of the premises demanded, when the action was commenced, and disclaim any right, title and interest therein," &c. It was held in *Treat* v. *Strickland*, 23 Maine R., 235, that when the general issue is pleaded, and a brief statement of the special matters of defence, not embracing, however, non-tenancy or tenancy in common, is filed, no actual ouster need be proved, as the general issue admits the tenant to be in possession of the premises as tenant of the freehold. The brief statements by which the defendants deny that they are tenants of the freehold, and disclaim severally any interest in parts of the demanded premises, were filed five terms after that in which the action was entered. By an act passed

in 1846, ch. 221, the plea of non-tenure is required to be in abatement and not in bar of the action. By the same statute, the disclaimer allowed by R. S., ch. 145, s. 9, to be filed by way of brief statement under the general issue, is now to "be filed within the time required for filing pleas in abatement, and not after, except by special leave of the court, and on such terms as the court shall direct."

No such leave has been granted in the present case. The case must be tried upon the general issue—the special brief statements upon which the defendants rely not having been seasonably filed.

The plaintiff shows a good title to the premises demanded, by a levy, in which no defects have been pointed out or appear. By the general issue the defendants admit they are in possession; and as they show no title nor right thus to be in possession, they must be regarded as disseizors.

Defendants defaulted.

INHABITANTS OF ORONO *versus* JOHN G. WEDGEWOOD AND ALS.

By pleading the general issue the corporate existence of a corporation is admitted, and cannot afterward be contested.

Defects in a warrant or tax list may be a good reason for not executing the warrant, but a collector having collected money without objection by the tax payers, is liable to account therefor, and his sureties cannot excuse themselves from paying the money collected by the principal in the bond wherein they have bound themselves that he "shall well and faithfully perform all the duties of his office."

REPORTED by APPLETON, J.

This action is upon a bond given by a collector of taxes for the faithful discharge of the duties of his office.

ARGUED by *S. H. Blake* and *W. C. Crosby*, for the plaintiffs.

J. S. Rowe and *N. Wilson* for the defendants.

APPLETON, J. By pleading the general issue, the defendants admit the corporate existence of the plaintiff, and are not afterwards permitted to contest it.

This action is upon a collector's bond, the condition of which is "that whereas said John G. Wedgewood has been chosen a collector of taxes for said town for the year 1855; now if said John G. Wedgewood shall well and faithfully perform all the duties of his said office, then this obligation to be void," &c. In *Ford* v. *Clough*, 8 Greenl. R., 335, the bond was conditioned to "faithfully discharge his duty as collector," &c. It was there held that the sureties could not, in an action on the bond for not paying over moneys collected, controvert the legality of the meeting at which he was chosen, nor the legality of the assessment of taxes antecedent to their commitment to him; nor any act of the town for which they would not be liable in consequence of their suretyship. In *Johnson* v. *Goodrich*, 15 Maine R., 29, it was decided that a collector of taxes who has given bond, is bound to pay over money voluntarily paid to him by the inhabitants, although he has received no collector's warrant, and the tax bills are imperfect and illegal. In *Kellar* v. *Savage*, 20 Maine R., 199, it was held that a collector of taxes, having acted in that capacity and given bond, was estopped to deny the legality of his election—and that in a suit on the bond, it was no defence that the assessment and the warrant accompanying the same had not been signed by the assessors. *Kellar* v. *Savage*, 17 Maine R., 445. In *Sandwich* v. *Fish*, 2 Gray R., 298, SHAW, C. J., says, "Defects in the warrant or tax list might be a good excuse for not executing the warrant. But to say that a collector, who has collected the money without objection by the tax payers, is not liable to account therefor, would be as contrary to the rules of law as to justice." No reason is perceived why the defendants should not be held to account for the moneys collected by the principal in the bond.

The evidence satisfactorily shows that a deduction should be made from the amount found due by the auditor, of the

sums of one hundred and twenty-five dollars, which was passed to the credit of the collector in the wrong year, and for twenty-three dollars and seven cents, which appears to have been collected on the warrant of the treasurer, against the collector, by the sale of his property. The sureties should not suffer from a mistake of the treasurer in passing the credit to a wrong account.

Defendants defaulted.

ARCHIBALD L. BOYD ET AL. *versus* CHARLES Y. EATON.

Where a stock of goods is sold at a distinct and separate price for each article, and the sale of some of those articles is illegal, an action may nevertheless be maintained for the value of the balance of the sale.

An action having been brought for the value of a stock of goods, and some of the items being for spirituous liquors at separate and distinct agreed prices, the plaintiff may amend by striking out the items of illegal traffic.

REPORTED by HATHAWAY, J.

The facts of the case are fully stated in the opinion of the court.

S. H. Blake argued for the plaintiff.

The amendment, whether it be regarded of "form" or "substance," was allowable. Rules of Court, 4 and 5.

In *Tarbell* v. *Dickinson*, 3 Cush. R., 346, the plaintiff had leave to amend by adding the whole bill of particulars to the writ, none having been annexed. And if you may add the whole, may you not strike out the whole; and if you may strike out the *whole*, may you not strike out a portion of it?

In *Soule* v. *Russell*, 13 Met. R., 438, the plaintiff had leave to amend by striking out one count after verdict, the jury agreeing as to one count and disagreeing as to the other.

So that the *amendment* and the *time when* it was made, were well enough.

The account was for goods and merchandise, and it is said that it contained items "contraband of war" under act of 1856, ch. 255, s. 18, but these contraband, illegal articles are now stricken out, so that no claim is made for anything sold in violation of law. *Towle* v. *Blake,* 38 Maine R., 528; *Cochrane* v. *Clough,* 38 Maine R., 25.

There is no pretence that this was a sale in gross or by the lump—so that the illegal cannot be separated from the legal—constituting one entire contract, the consideration being indivisible, as in *Ladd* v. *Dillingham,* 34 Maine R., 316, but it was a sale of each and every article by itself, every article being separately weighed or measured, and price fixed, the price of the liquor not entering into or mingling at all with the price of the other articles now claimed.

A. Sanborn argued for the defendant.

The plaintiffs sold all the articles selected by the defendant from their stock of goods, in the Market House, to him.

It was one entire sale; all the articles of the stock were sold together. The stock was one—an entirety; so was the sale one—an entirety.

The ale and cherry brandy were parts of the stock, and with the other articles, made up the stock.

The ale and the cherry brandy were intoxicating liquors.

The sale of intoxicating liquors was prohibited by statute, and was therefore illegal. Laws of 1856, ch. 225, s. 1.

A part of the entire consideration of the defendant's promise was, demonstrably, illegal, and the promise is, consequently, void. Partial illegality of consideration vitiates the promise entirely. 1 Parsons on Con., 380, and cases there referred to.

The promise of the defendant was, not to pay for each item of the stock sold December 29, 1856, separately, but for all together. The promise was, therefore, entire; if, then, the consideration was partial, on this ground the promise is void, as against law—in violation of law. Chitty on Con.,

692, 693; 11 East. R., 502; *Lomis* v. *Newhall*, 11 Pick. R., 167; *Deering* v. *Chapman*, 22 Maine R., 488; *Ladd* v. *Dillingham*, 34 Maine R., 316.

This case is entirely different from *Towle* v. *Blake*, 38 Maine R., 525. There the bill of particulars showed a running account—items delivered from time to time, from December, 1848, to September, 1849. There was not *one* sale, but *as many* sales as there were times of delivery of the several items. And the decision of the court is simply, that the separate sales of the liquors only were void. But in this case the sale was an entirety, made at one and the same time, and is indivisible.

Suppose the defendant had given the plaintiffs a note to pay for this stock of goods, sold December 29, 1856. Nothing is clearer than that the note would be altogether void. This is established law, and is incontestible. *Deering* v. *Chapman*, 22 Maine R., 488, and authorities there collected. The opinion of WHITMAN, C. J., is very full and decisive to this point.

Where is the difference between the promise of the defendant as expressed in a note, and the promise in this case? None, only that the one is in writing—the other not. The legal effect or disability of each is the same.

I do not see how the conclusion can be avoided, that the sale was void, the promise of the defendant void, and the amendments improper and illegal. Otherwise it is in the power of a single judge to legalize an illegal sale, to enforce a void promise, to nullify and repeal an act of the legislature, thus uniting and exercising the powers of the judicial and legislative departments of the government, which is expressly prohibited by the constitution.

APPLETON, J. This was an action of assumpsit upon an account annexed. It appeared in evidence that the plaintiffs, having a stall and stock of goods in the Market House in Bangor, sold on the 29th of December, 1856, to the defendant, their fixtures, and such articles of their stock as he might

select; that he selected those specified in the account in suit, among which are found various articles, the sale of which is prohibited by law. The articles are all charged as of the same date, but separate prices were affixed to each article.

At the trial at *Nisi Prius*, the plaintiff's counsel moved to amend by striking out of the account the articles, the sale of which was unlawful. This amendment was allowed, against the protest of the counsel for the defendant.

It was insisted in argument, that the sale of goods, as above stated, constituted an entire contract; that being entire, it is void by the statute prohibiting the sale of spirituous liquors; and that the presiding judge erred in allowing the amendment.

It was held in *Drew* v. *Blake*, 38 Maine R., 528, that in a suit upon an account, some of the items of which were for spirituous liquors sold in violation of law, that the plaintiff might amend by striking out the items for liquor, and recover on the account thus amended. The account in that case embraced some months, during which the articles were delivered, and it is urged that as they were sold at different times, they may be regarded as several sales, and that therein it differs from the case at bar. But the precise question under consideration came before the Supreme Court of New Hampshire, in *Walker* v. *Lovell*, 8 Foster's R., 138, and in *Carleton* v. *Woods*, 8 Foster's R., 291, where it was held that when an entire stock of goods is sold at one and the same time, but each article for a separate and distinct agreed price, the contract of sale is not to be regarded as entire and indivisible, and if the sale of some of the articles be prohibited by law, the illegality will not render the sale of the other articles illegal also. "We are unable," says WOODS, J., "to see how this case differs from the case of a sale by a merchant of various goods to his customer, at one and the same time, for separate values, stated at the time, which, when computed, would of course amount to a certain sum in the aggregate. When in such case the goods are charged to the customer, and the sale of part of the goods should be found to be illegal, we

think it would be difficult to maintain upon any legal or equitable principles, that under a proper declaration, the value of the goods which were proper and legal articles of sale, could not be recovered."

In the case before us, the defendant was to select such goods as he might choose. Each article selected had its appropriate price. The bargain for its purchase was several and distinct. The defendant ought not to be permitted to evade the payment of articles legally sold, because he may have subsequently elected to purchase other articles at an agreed price, the sale of which was prohibited by statute.

Default to stand.

EDWIN P. BALDWIN *versus* RUSSELL L. MERRILL ET AL.

By the act of 1856, ch. 263, s. 2, the court is authorized to receive evidence that no service of a citation of a poor debtor was made upon the creditor, notwithstanding such evidence may contradict the record of the magistrates; but a citation issued with a seal upon it which had accidentally fallen off when it was served by the officer by reading it to the creditor, is a good service, and not within the spirit or letter of that statute.

This case is REPORTED by APPLETON, J., and the facts appear in the opinion of the court.

The case was ably argued by *A. L. Simpson*, counsel for the plaintiff,

And by *J. Crosby*, counsel for the defendants.

APPLETON, J. This is an action of debt upon a poor debtor's bond, to which the certificate of the magistrates before whom the disclosure was had, is relied upon as a defence.

"It has often been decided, in this state," remarks SHEPLEY, C. J., in *Clement* v. *Wyman*, 31 Maine R., 50, "that the certificate of the justices respecting the notice is conclusive, unless its effect be destroyed by an agreed statement of facts,

or by a voluntary admission of illegal testimony." In *Pike* v. *Herriman*, 39 Maine R., 52, the adjudication of the magistrates as to the notice given to the creditor, was held to be conclusive, and not examinable upon *certiorari*. In the last mentioned case evidence was offered to show that *no notice* had been given to the creditor or his attorney, but it was excluded.

The act of 1856, ch. 263, would seem to have been passed to obviate the injustice which might arise in cases like that of *Pike* v. *Herriman*, when in fact there had been no notice given to the creditor or his attorney.

By s. 2, the court is authorized to "receive evidence to show that *no service* of the citation provided for by law was made upon the creditor or assessor, notwithstanding such evidence may contradict the record and certificate of the magistrates before whom the oath was taken."

The citation is proved to have had a seal affixed, when issued by the magistrate. When served by the officer it seems the seal had ceased to adhere to the citation. The service was by reading. The only objection to the service is, that when read to the creditor the seal had dropped off—without fault of the officer or the debtor. This assuredly cannot be regarded as a case where there was *no service* of the citation.

The proof offered to avoid the effect of the certificate of the magistrates, is neither within the spirit nor the letter of the statute, and cannot avail the plaintiff. The certificate is a bar to the action, and the plaintiff must be nonsuit.

Plaintiff nonsuit.

MARY E. MOODY, *app't from a decree of the Court of Probate,*

versus

EBENEZER HUTCHINSON, *Creditor, Appellee.*

On appeal from a decree of the Court of Probate, the whole proceedings are again examinable in the appellate Court, so far as they are opened by any of the causes assigned, and new testimony may be had upon those issues.

Land warrants are not to be regarded as real estate by a Court of Probate.

APPLETON, J., heard the questions presented by the appeal at *Nisi Prius*, and EXCEPTIONS were taken to his ruling in matter of law. The facts in the case appear clearly in the opinion of the court.

E. Kent, for the appellant, argued in writing.

The appellant had a right to appeal, not merely *except* on point of law.

The judge is to make allowance out of the *personal* estate, as he shall judge necessary. Ch. 108, s. 18.

The right to appeal by any party aggrieved, is given by R. S., ch. 105, s. 18, and he may appeal therefrom to this court, which is the Supreme Court of Probate, and has appellate jurisdiction of all matters determinable by Judges of Probate. Ch. 96, s. 29.

When appealed from, the whole case is here, and this court is to determine what is a reasonable allowance. This is to be heard by the single presiding judge, as the law now is, subject to any exception as to his ruling of the law. The judge presiding ruled, upon examination of the case before him, that land warrants were to be considered real estate, and therefore, as the widow had been allowed all the personal estate except the land warrants, he affirmed the decree.

All that it was necessary to set forth in the exceptions, was enough to present the point of law.

The question here is only this, was the ruling of the judge

that the land warrants, named in the reasons for appeal, were real estate, and not personal.

The question fairly stated is, how are such land warrants to be treated in the settlement of estates under our laws.

I find that the definition of the words "land or lands," and the words "real estate," as given among the definitions in ch. 1, ss. 3 and 10, "shall be construed to include lands, all tenements and hereditaments connected therewith, and all rights thereto, and interests therein." Ch. 92, s. 23.

What is a land warrant? Not any *title* to any land. It is merely a certificate that A B "is entitled to locate 160 acres at any land office of the United States, in one body, and in conformity to the legal subdivisions of the public lands, upon any of the public lands subject to sale at either the minimum or lower graduated prices." This is the language quoted from a land warrant issued from the department at Washington.

If the estate had been solvent, would these land warrants have descended to the heirs, under ch. 93, as real estate?

I say that this land warrant is not a deed. The deed from the government is what is called a patent, issuing after a location, of a specific lot of land, set out by number, or metes and bounds. When that is delivered, a conveyance of real estate is perfected, and a title acquired. But until that is done no title passes, nor any interest in any particular lot of land.

The warrant is a mere voluntary permission on the part of the government to a man to locate—designate—set out a certain lot, out of unlocated lands, and when he has done so, to have a deed.

It resembles a bond for a deed, on performance of certain conditions. A gives B a bond, conditioned that he may, within twenty days, designate an acre from his farm, and upon such designation and location, he will give him a deed. This is a mere personal obligation. If he dies in five days, without locating, is that bond to be treated as real estate, to be administered upon as such? Clearly not. No title to

real estate—no interest legal therein passes—no acre is secured.

The question in this case has particular reference to the estate of an insolvent. If these warrants are to be treated as real estate, they must be administered upon as real estate, and sold as real estate, to pay debts.

Ch. 112, s. 31, specifies what estate of a deceased person is subject to be sold. "Lands of which the testator or intestate died *seized in fee* simple or in fee tail, general or special." Did Mr. Moody die seized in fee simple of any of the United States lands? The *fee* remains in the United States until a deed by patent is granted.

So the statute regulating sales of real estate by guardians, and all other similar statutes, proceed upon the idea that the estate is a *real* estate, in specific portions of land, or interests in some particular piece of land.

So to of dower—ch. 95. If this is real estate the widow is entitled to dower. *Non constat* that it is wild land or will be—"it is any public lands subject to sale." It may be land from which immediate annual rent or products may be obtained. The prairie land of the west is not wild land, requiring clearing as ours. Now how can a widow's dower be set out on a land warrant? The husband has never been seized of any estate, any more than in the case of a bond, before named; and yet a widow is entitled to dower in *the lands* of her husband, whether he die seized or not. But he must have once been seized. But has the holder of a land warrant ever been seized of any 160 acres, so that the wife's right to dower attached?

If a land warrant is to be treated as real estate, what is to be the *modus operandi?* What is to be sold?—what deeded?—what bond to be given?—what becomes of the widow's rights. The administrator can give no deed of any specific land—can only assign the government bond—transfer a mere right to locate or to obtain a deed *in futuro.*

As personal estate, the course is plain and simple—to sell

and assign as *choses in action*, or debts of any kind, by note, bonds or simple obligation.

If it is said that the government at Washington treat them as real estate, I answer, that it is merely a regulation of the department, not a law of Congress. And this regulation is to the extent merely of requiring transfers and assignments to be made, with the *formalities* of real estate. Does not pretend to settle the law, but merely for security, and facility, and regularity, and convenience, directs as a department regulation merely, that in transfers the *forms* of real estate conveyances should be observed. And a department cannot enact laws. It can make regulations for its own department, if they are conformable to law. But it cannot, by any rule, change real into personal estate, or *vice versa*. Even then if the department had declared land warrants to be real estate, such declaration, beyond the mere requirement of form of assignment, would be inoperative and void.

The exact question, I suppose, is, whether this certificate or land warrant creates—gives *an interest* in land, or whether it is only a right to acquire such interest by doing certain acts—locating and designating.

Does a land warrant make the holder a tenant in common with the United States, of all unlocated lands, in the proportion of 160 acres to the whole unlocated lands?

It was decided by Judge McLean, *Dubois* v. *McLean*, 4 McLean R., 486, that the legal title to land held in Illinois, under a confirmation by the governor of that state, ratified by Congress, is not vested in the claimant until the issue of a patent.

I have looked into the Digest of United States Reports, and I find numerous cases, and all to this effect, that no title to any land or interest in any passes until a patent issues; that the warrant creates no legal interests in any land. 3 Texas R.; 12 vol. Digest, U. S., p. 396.

In *Wilcox* v. *Jackson*, 13 Peters R., it is said, "In this case no *patent* has issued, and therefore, by the laws of the United

States, the legal title has not passed, but remains in the United States." And also that no state law could constitutionally declare that it did pass.

In that case the land had been entered, and a register's certificate had been given. And in most of the cases where any question has arisen, the case shows an *entry* and register's certificate, and yet even after location and designation legally made, it has been repeatedly decided that no title passed until a patent issued.

The case of *Heald* v. *Hodgdon*, 16 Maine R., 219, shows that a mere certificate of a right to locate, confers no right until actual location.

E. Hutchinson, orally *per se.*

CUTTING, J. The Judge of Probate decreed, "That an allowance be made to the said Mary E. Moody, out of the personal estate of said deceased, of ten hundred and twenty-four dollars and sixty-three cents, in such articles as she may choose to that amount, according to the appraisement thereof in the inventory." From which an appeal is made to this court, for several reasons. *First*, because the allowance is insufficient, considering the degree and estate of her husband and the state of her family. *Second*, because, in estimating the amount of the personal estate, the judge erroneously determined that land warrants, granted by the United States and belonging to the estate, were real and not personal property. And three other causes, embracing in substance the two former. And it appears that the judge at *Nisi Prius*, before whom the appeal was heard, "decided that the land warrants are to be considered real estate, and thereupon affirmed the decree appealed from." To which ruling an exception is taken, and in this mode that question is presented to us.

By R. S., ch. 108, s. 18, the widow would be entitled, "besides her apparel and ornaments, to so much of the personal estate, as the judge shall determine to be necessary, according to the degree and estate of her husband, regard being

had to the state of the family under her care." Consequently her allowance must depend in some measure upon the value of the personal estate, since in no event can it exceed that amount. It became important, therefore, (or might if the case was properly presented,) that the judge should discriminate correctly in determining what was personal and what was real estate, which was borne upon the schedule of the intestate's property.

The act of Congress, of 1812, declares that, "In all cases in which land has heretofore, or shall hereafter, be given by the United States for military services, warrants shall be granted to the parties entitled to such land, by the Secretary of War, (now, by the act of 1850, by the Secretary of the Interior;) and such warrants shall be recorded in the said land office, in books to be kept for that purpose, and shall be located as is or may be provided by law; and patents shall afterwards be issued accordingly." And s. 8, that—"All patents issuing from the said office shall be issued in the name of the United States, and under the seal of the said office, and be signed by the President of the United States, and countersigned by the commissioner of said office; and shall be recorded in the said office, in books to be kept for the purpose."

From the foregoing provisions it would seem that the warrant conveys no title, but only establishes certain facts, such as, that the beneficiary has performed military services, and proved his claim to the bounty, and will be entitled to a patent for the specified number of acres in the otherwise unappropriated public lands, whenever the same should be located. It is in most respects similar to a bond for a deed. It is transferable, and usually passes from hand to hand like bonds and scrips of corporations, by an assignment, without the formality of registration; and the patent is granted to the person who makes the location, and produces the necessary evidence to the department that he holds the warrant. And by the act of 1852, such warrants are made not only assignable, but receivable in payment of pre-emption rights.

Before the patent issues the fee is in the government; afterwards it passes to the grantee. *Bagnell* v. *Broderick*, 13 Peters, 450.

If the fee does not pass upon the delivery of the warrant, then nothing can pass except the obligation of the government, which is a chose in action, and although not capable of being enforced by an action at law against the government, the warrant is none the less an executory contract. It is neither "lands, tenements, or hereditaments, or any rights to or interests therein," but only one of the progressive stages in such an acquisition.

But assuming that land warrants are not *evidentia* of title to real estate, it is contended, and the case shows, upon a hearing of this appeal, the appellee objected, that the decree and the record of the probate judge and reasons of appeal did not present that question.

It is true that on an appeal from the Probate Court, the whole proceedings are again examinable in the appellate court, so far as they are opened by any of the causes assigned, and new as well as the former testimony may be introduced touching those issues, which are in this case: *first*, as to the sufficiency or insufficiency of the allowance; and, *secondly*, as to the right or wrong conclusion in relation to the character of the warrants, which issues are virtually synonymous, since the former is or may be dependent on the latter. And it may be contended by the appellee, *that* it does not appear from the facts disclosed, otherwise than from the probate decree, that the intestate left any estate, either real or personal, or what was the degree or estate of the intestate, or the state of the family under the appellant's care; *that* it would not necessarily follow, because the judge erred in relation to his construction of the warrant, that the allowance was insufficient; *that* reasons of appeal, which are founded on allegations of fact that do not appear upon the record, and of which no proof has been offered, cannot be maintained—citing *Lamb* v. *Lamb*, 11 Pick., 374; *that* there is no evidence reported, which would exclude the idea, that

the ruling excepted to was not based upon an abstract question of law, which heretofore has not been entertained by this court—citing *Hopkins* v. *Fowler*, 39 Maine R., 570, and *Dyer* v. *Huff*, 43 Maine R.

The foregoing propositions lead to another inquiry, in order to ascertain whether this case has been so defectively presented as to render the exception a nullity; and that inquiry is, as to what the record does disclose. The bill of exceptions states, among other things, that the Judge of Probate allowed the appellant the sum before mentioned, and further finds that it was "all the personal property." And further, that the court "decided that the land warrants are to be considered as real estate." From which we are authorized to infer, as indeed the bill discloses, that there was on trial a recognition of personal property and *the* land warrants; *that* the judge presiding, in his haste to dispatch the business of the term, in anticipation of the regular progress of the cause, on inquiry of counsel, ascertained the real point in dispute, and for the purpose of presenting the question to the full court, ruled accordingly. And in the *present* instance we can readily perceive that such a course might not operate unjustly; for if the warrants were evidential of the realty, the appellant had by the decree received all she was entitled to by statute; and such being the opinion of the presiding judge, whether ascertained by information, anticipation, or otherwise, any evidence as to the number and value of the warrants and condition of the family would have been superfluous. It is sufficient for us to be informed of record, that "the land warrants" composed part of the assets of the estate, in order to determine that the ruling was no abstraction. And inasmuch as the exceptions refer to and embrace *the land warrants*, and in consequence of the ruling "thereupon the decree appealed from was affirmed," and the ruling being found to have been erroneous, for the purpose of correcting such error, the appellant is entitled to a new trial.

Exceptions sustained.

RUFUS DWINEL, *Petitioner for Review,*

versus

ESTHER GODFREY, *Administratrix.*

Upon hearing of a petition for review where facts are presented as newly discovered evidence, which, if introduced at the trial upon the original action should be passed upon by the jury, and which would be sufficient to sustain a verdict for the petitioner; it seems that a review should be granted.

No statement contained in any deposition taken *in perpetuam* can be given as evidence against the deponent, or any one claiming under him.

PETITION FOR REVIEW.

EXCEPTIONS. APPLETON, J., presiding.

The presiding judge decided that the evidence set forth in the petition as newly discovered, and produced at the hearing, had been discovered since the rendition of judgment; and that there had been no negligence or laches on the part of the petitioner in not discovering it, and producing it at an earlier date, but as a matter of law, that all the evidence adduced by the petitioner was not sufficient to authorize a jury to find a verdict in his favor; and therefore, as a new trial would be of no avail to the petitioner, he refused to grant the review.

Rowe & Bartlett, counsel for the petitioner.

A. Sanborn, counsel for the respondent.

TENNEY, C. J. Upon the hearing under this petition, evidence was introduced and reported. The judge who presided has certified that the evidence set forth in the petition as that of which the petitioner was ignorant at the former trial, has been discovered, in fact, since the rendition of the judgment against him; and that there has been no negligence or laches, on his part, in not discovering it, and producing it, at an earlier date. But, as *matter of law,* it was

adjudged that all the evidence adduced by the petitioner at the hearing was not sufficient to authorize a jury to find a verdict in his favor; and as a new trial would be of no avail to him, a review was refused.

The contract on which the action against the petitioner was founded, was dated in November, 1835. It acknowledges the receipt of the sum of $3000 from the respondent's intestate, for which the petitioner promised to convey certain real estate therein described, without any condition, and without the specification of any time when the conveyance should be made. The intestate remained in the county of Penobscot for several years after the date of this contract, apparently in a necessitous condition as to property, grossly insolvent, in the opinion of those who best knew the state of his affairs, and having, in several instances, disclosed as a poor debtor; and neither in those disclosures, or in any other manner, having adverted to this contract as property belonging to him. He left Oldtown in the year 1838 and went to the state of Georgia, where it is admitted that he died in July, 1840.

It appears that this contract was found by George W. Ingersoll, much to his surprise, in a part of his office which had never been a place of deposit for papers regarded as valuable, in the year 1847 or 1848. He has no knowledge of having the paper intrusted to him by the intestate, or by any other person; that he had not been employed by Mr. Godfrey professionally before his death, and he is entirely unable to even conjecture for what purpose the paper should have been left in his office. He sent the paper to the respondent, who, it appears, after a delay of several years, by reason of being unable to obtain sureties upon an administrator's bond, took letters of administration, and proceeded to administer the estate of her late husband. The contract in question was appraised in the inventory at the sum of one dollar.

The direct evidence, adduced under the petition, tends, in some degree, to show that the intestate had no valuable interest in the contract, and that this and other matters, hav-

ing a connection therewith, were settled. Facts are presented in the report, which, if introduced in a trial of the original action, should be passed upon by the jury, in the issue between the parties therein. If the petitioner, upon such facts, should obtain a verdict, we think it would not be set aside by an imperative rule of law that the evidence was not sufficient to sustain it.

The admissions of the respondent, contained in her deposition, taken in perpetual remembrance, on the application of the petitioner, were properly excluded under the statute of 1852, ch. 242. The declarations made at the time of taking that deposition were the same which were incorporated into the deposition, and were equally inadmissible with the admissions in the deposition itself.

Exceptions sustained.

APPLETON, J., did not concur.

CHARLES H. HATHAWAY *versus* PATRICK MORAN.

Whatever is done in contravention of a statute cannot be made the subject matter of an action.

The subsequent repeal of the act of 1855, prohibiting the sale of intoxicating liquors, can have no effect upon a contract made while it was in force.

EXCEPTIONS were taken to the rulings of HATHAWAY, J., presiding at *Nisi Prius*.

The action is ASSUMPSIT upon a note of hand, and on an account annexed for twenty gallons of American gin, sold by the plaintiff to the defendant. The writ bears date March 5, 1856. The case was referred to the court, the parties reserving the right of exceptions in matters of law ruled upon by the court. It was proved that at the date of the writ, there was a balance of ten dollars and fifty cents due on the note. The charge of twelve dollars for gin was also proved.

The court decided that a default should be entered, and that the plaintiff should have judgment thereon for ten dollars and eighty one cents, and interest from the date of the writ, and that the plaintiff was not legally entitled to recover for the gin, that charge being for spirituous and intoxicating liquors, sold in violation of law.

Whereupon the parties, by consent, submitted the case to the whole court, and if the ruling of the judge presiding concerning the charge for the gin was correct, his decision is to be affirmed, and judgment rendered on the default accordingly; but if his ruling concerning that charge was erroneous, and the plaintiff is legally entitled to recover for the gin, then the plaintiff is to have judgment for twelve dollars, in addition to the balance due on the note.

S. H. Blake argued for the plaintiff, that the sale of the gin, October 29, 1855, was therefore in violation of the statute of 1855.

It was also a sale of gin, the value of which could not be recovered, by reason of ss. 10 to 22, inclusive, of the act of 1846, that were in force when the gin was sold.

But ss. 10 to 22, of the act of 1846, were repealed by the act of 1856. The prohibitory part of the act of 1846 had been repealed before, viz: in 1851. So that ss. 10 to 22, of the act of 1846, merely providing that no action should be maintained, being repealed by the act of 1856, there is now no bar to the maintenance of the action by reason of ss. 10 to 22, or other provisions of the act of 1846.

We then return to the act of 1855. That act repealed the acts of 1851 and of 1853, leaving the aforesaid sections of the act of 1846 standing, but that now are brushed out of the way.

October 29, 1855, when the gin was sold, we could not have sued and recovered for it, its sale being prohibited by that statute.

But the act of 1856 repeals the act of 1855, and lets down the bars that were put up against us, and the question is,

whether our gin is a creature of life to walk over them, or was killed by the statute of 1855, under which it came into being.

Was the sale void and dead when made, and as soon as made, or was it a live and valid contract, waiting only the removal of the hindrance of the statute, to be enforced?

A contract "*malum in se*," and prohibited by statute, does not revive when the statute prohibition to its enforcement is removed, because it is a *void* contract in its inception.

But the sale of ardent spirits is not "*malum in se*." For the revenue laws of the United States contemplate its sale.

Every state statute we have had upon the subject expressly admits the right to sell, but assumes to regulate and control the mode and manner of the sale merely.

To *sell*, therefore, by and of itself is right. A. sells under act of 1855; he cannot go into court to enforce his contract; he must, too, pay the penalty imposed upon acts of sale.

But *when* the act of 1855 is repealed, the *penalty* can no longer be imposed, and the bar to his suit does not any longer exist.

A. L. Simpson argued for the defendant.

The only point in this case is, can the plaintiff recover for the twenty gallons of gin charged in his writ, sold October 29, 1855?

The liquor law of 1855 was in force at the time this sale was made. The first section of that act prohibits the sale of intoxicating liquors; the second section affixes a penalty for selling. The twenty-third section makes all contracts for the sale of liquors utterly null and void, with certain exceptions, which do not apply to this case. The same section also provides that "no action of any kind shall be maintained in any court in this state, for intoxicating liquors. This statute was in force at the time this gin was sold.

The liquor law of 1856 repeals this law of 1855, under which this gin was sold. Now the question arises, what effect does this repeal have?—does it make valid contracts

which were made under the law of 1855, which were forbidden by that statute? We say not. We say that the law under which the contract was made must control the contract. "The law of the contract travels with it wherever the parties thereto are to be found, and into whatever *forum* it is attempted to be executed." *Judd* v. *Porter*, 7 Greenl. R., 339.

We say the contract was void at the time it was made, because the article sold was prohibited.

"A contract is void if prohibited by a statute, though the statute only inflicts a penalty, because such a penalty implies a prohibition." Chitty on Con., 6 Am. ed., p. 694.

"Every contract *made* for or about any matter or thing which is prohibited and made unlawful by any statute, is a *void* contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute." *Bartlett* v. *Vinor*, quoted from HOLT, C. J., by Chitty on Con., 6 Am. ed., p. 695.

The first section of said act of 1855 affixes a penalty for selling under that statute. This clearly makes the statute prohibitory, and if prohibitory, all contracts made under it were and are void.

"The general principle is well established, that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is *void*, as being against the policy of the law." "This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute, on the ground of public policy." *Warren* v. *Manufacturers Insurance Company*, 13 Pick. R., 521.

There can be no doubt as to the intention of the legislature that passed the act of 1855. They intended to make the sales of liquor void. They regarded its sale as an evil. It was an evil prohibited by that statute, and the legislature of 1856, although they repealed the act of 1855, without any

saving clause, regarded the sale of liquor in the same light as did the legislature of 1855, for they also prohibited the sale of liquors, affixed a penalty for selling, and made contracts void which are for the sale of liquor.

In *Wheeler* v. *Russell*, 17 Mass. R., 256, in a case where shingles were sold, which were not of the quality required by law, for which a promissory note was given, the court held that an action on the note could not be maintained, because the shingles were sold in violation of a statute. I would refer the court especially to this decision, as the principle involved in this case is ably argued by the court in that. I would also call the attention of the court to the case of *Springfield Bank* v. *Merrick*, 14 Mass. R., 322. The statute of 1809, ch. 38, was set up as a defence to this action, which made it unlawful for any bank to loan, negotiate, receive in payment, or otherwise deal in, the bank bills of other states, and affixed a penalty to any one who should transgress this law. The note upon which the suit was founded, was made and received during the existence of this law, and in direct violation of its provisions. It seems that when this action was commenced, that statute had been repealed, and the court say, that "the subsequent repeal of the act can have no effect upon a contract made while it was in force. As well might a contract made for the purpose of trade with an enemy during a war, be purged of its illegality by the return of peace."

HATHAWAY, J. The twenty gallons of gin, for which the plaintiff claims to recover, was sold in violation of a public statute. The general rule is, that what is done in contravention of a statute cannot be made the subject matter of an action. *Laughton et als.* v. *Hughes et al.*, 1 Mau. & Sel. R., 593; *Wheeler* v. *Russell*, 17 Mass. R., 258. The rule applies to contracts founded on a transaction prohibited by statute on the ground of public policy, as well as those founded on a transaction *malum in se*. *Warren* v. *Man. Ins. Co.*, 13

Pick. R., 518; *Russell* v. *DeGrand,* 15 Mass. R., 35, and Rand's notes.

The subsequent repeal of the statute of 1855 can have no effect upon a contract made while it was in force; "as well might a contract, made for the purpose of trade with an enemy, during a war, be purged of its illegality by the return of peace;" per PARKER, C. J., in *Springfield Bank* v. *Merrick et al.,* 14 Mass. R., 322. And beside, the plaintiff's action was commenced March 5, 1856, as appears by the date of his writ, at which time the statute of 1855 was in force, not having been repealed until April, 1856.

The plaintiff cannot recover pay for the gin, and, as agreed by the parties, the decision of the judge who presided at *Nisi Prius* is affirmed, and judgment to be rendered accordingly.

RICHARD LEWIS *versus* WILLIAM R. SOPER.

A survey of hoop poles before sale is not required by statute.

The caption of a deposition reciting that "the aforesaid deponent was *first* sworn according to law and *then* gave the foregoing deposition, is in accordance with the statute requirements.

Where the death of either party is suggested after verdict, judgment may be entered as of the term when the verdict was rendered.

EXCEPTIONS to the rulings of APPLETON, J., at *Nisi Prius.*

ASSUMPSIT for hoop poles claimed to have been sold by the plaintiff to the defendant.

The plaintiff put into the case, subject to the defendant's objection, the depositions of Otis W. Lewis, Thomas J. Lewis, Jacob Martin and Charles Rowell. The defendant objected to the caption of each of said depositions, and to the substance of the depositions; but the court overruled the objection, and permitted them to be read to the jury. The

magistrate certified in each that the aforesaid deponent was first sworn according to law, and then gave the foregoing deposition.

The defendant requested the judge presiding to instruct the jury that the plaintiff could not recover in this action, unless these hoop poles were surveyed or culled as required by the R. S., ch. 66.

The judge instructed the jury that hoop poles did not come within the provisions of ch. 66 R. S., and that there was no law requiring that they must be surveyed or culled by a sworn surveyor before sale.

That on the sale of personal property, when anything remains to be done before the sale can be considered as complete, whether to be done by the vender or vendee, as between the parties, the title does not pass, although the property is placed in possession of the vendee.

That if the ascertainment of the quantity was to be by the procurement of the plaintiff, he could not maintain an action till that was done; that if by the defendant, and he took possession of the property, and unreasonably neglected and delayed to procure it surveyed and the quantity ascertained, that he could not retain the property in his possession and unreasonably neglect to obtain a survey, and thus prevent the plaintiff's recovery.

That if the defendant took possession and used any portion of the poles, converting them into hoops, he would be liable for the value of those so taken by him.

To which rulings the defendant excepted.

W. Folsom argued for the plaintiff.

The ruling of the presiding judge was correct, in admitting the depositions, the captions of which were sufficient. "According to law, and when" is all that is required. R. S., ch. 133, s. 17.

The words "according to law" are sufficient to show that the oath was administered in the terms of the statute, and in a mode which practice had sanctioned. *Atkinson* v. *St.*

Croix Man'g Co., 24 Maine R., 175; *Bachelder* v. *Merriman*, 34 Maine R., 69. It therefore shows that the deponent was not only sworn to testify the truth, the whole truth, and nothing but the truth, but it as clearly shows that it was relating to the cause or matter for which the deposition was to be taken.

The remaining fact to be stated is "when" he was so sworn; and this clearly appears in the captions in this case, to wit: he was *first* sworn and *then* gave the foregoing deposition. The case of *Brighton* v. *Walker*, 35 Maine R., 132, when carefully examined, will be found to be in conformity with these principles. There the language of the captions, says RICE, J., "clearly imports that the deposition was written and subscribed by the deponent *before* the oath was administered," and the deposition was excluded because the oath was administered at an *improper time;* and the reasoning of the court in that case, however often misunderstood or misrepresented, only shows that the words "according to law" could not cure the defect or be sufficient to show *when* the oath was administered.

In relation to the requested instruction, which was refused, it is respectfully contended that the decision of the court thereon was correct, because every provision of ch. 66, of the R. S., that relates to the survey or the culling of hoops, refers only to hogshead hoops exposed for sale or packed for exportation "which shall be of white oak or walnut." The hoop poles in question were of ash, out of which barrel hoops were *to be manufactured.*

Again, the provisions of ch. 66, relate only to hoops when manufactured, and not to the poles out of which they are made; any more than the other provisions of the statute, requiring the survey of boards, clapboards and shingles, embraces, and requires that the round logs out of which they are to be manufactured should be so surveyed, packed and marked, which would be both impossible and absurd.

The 29th section of said chapter, prescribes the mode in which "all mill logs shall be surveyed," but no provision is

found directly or indirectly requiring hoop poles to be surveyed or culled, and it is not believed that this court has either the power or the disposition to supply or add a new provision to the statute, even though the cooper testifies that it is customary to look over and ascertain the quality and quantity of hoop poles at the time they are purchased.

A new trial will not be granted on account of evidence *even erroneously* admitted, if, under the instructions given to the jury, substantial justice has been done by their verdict. *Kelley* v. *Merrill*, 14 Maine R., 228.

The other ruling of the court, and instruction to the jury, according to the authority of *Wing* v. *Clark*, before cited, was quite too favorable for the defendant, and to him it furnishes no cause for complaint.

C. P. Brown and *L. Barker*, counsel for the defendant.

APPLETON, J. By R. S., ch. 66, s. 5, "surveyors of shingles, clapboards, staves and hoops," are to be appointed, and by other sections of the same statute hoops are to be surveyed in certain cases. But hoop poles are the materials out of which hoops are to be manufactured, and are not required to be surveyed.

The depositions of Rowell and Martin were properly admitted. The certificate of the magistrate in each case was that "the aforesaid deponent was *first* sworn according to law, and *then* gave the foregoing deposition." This is in accordance with the form of caption prescribed by R. S., ch. 133, s. 17, in which it is required that it should be stated, "that the deponent was sworn according to law, and when." In *Atkinson* v. *St. Croix Manufacturing Company*, 24 Maine R., 174, the depositions were held to be inadmissible, because it nowhere appeared from the certificate of the magistrate, before whom they were taken, that the deponent had been "first sworn," as is required by s. 15. In *Parsons* v. *Huff*, 38 Maine R., 137, the magistrate undertook unnecessarily to set forth in the caption the oath by him administered to the deponent. This was found to be defective, because the mag-

istrate, by his own showing, omitted the words "relating to the cause or matter for which the deposition is to be taken," which by s. 15 are part of the oath to be taken by the deponent. In the case of *Atkinson* v. *St. Croix Manufacturing Company*, the oath did not appear to have been taken at the right time. In *Parsons* v. *Huff* the oath administered by the magistrate was specially set forth in the caption, and was seen to be variant from that which the statute requires to be administered. In the depositions now under consideration, the oath was rightly administered as to time, being before the deposition was given, and correct as to form, being certified to be "according to law," and nothing appearing, as in *Parsons* v. *Huff*, to show it variant from the statute.

The instructions to the jury are not perceived to be adverse to the defendant. If in any respect erroneous, it is that they are too favorable to him, and to this he certainly cannot except.

When this case came on for argument in the order of the docket, the counsel for the defendant being absent, it was submitted by the counsel for the plaintiff on his brief—he insisting on his legal right to have the case then argued, and that his client should not suffer for the neglect of the defendant's counsel. The counsel for the defendant was advised of this, but he neglected to submit any argument, and near the close of the term suggested the death of the defendant. Under the circumstances, we perceive no ground for delay in the final disposition of the cause.

The death of the defendant has been suggested during the present law term. It seems well settled, that in such case judgment may be entered up as of a preceding term. In *Goddard* v. *Bolster*, 6 Greenl. R., 427, the plaintiff in trespass *quare clausum fregit* died after verdict in his favor, and before judgment, and the court ordered judgment to be entered as of the term in which the verdict was retuned. In *Corwin* v. *Lowell*, 16 Pick. R., 170, the plaintiff deceased after a verdict had been rendered in his favor, and the court, at a subsequent term, advised judgment to be entered up as

of a day when he was in full life. PUTNAM, J., in delivering the opinion of the court, fully affirmed the law as stated in Tidd's Practice, (1 Am. ed.,) 846, that, "if either party after *verdict* had died in vacation, judgment might have been entered that vacation as of the preceding term, and it would have been a good judgment at *common law* as of the preceding term."

This action was tried April term. Judgment must be entered up as of that term.

Exceptions overruled,
and judgment as of the April term, 1857.

JOSHUA W. CARR *versus* JOHN MASON *et als.*

Subsequent to the commencement of an action upon a poor debtor's bond, one half of the original judgment was released by the creditor, and the court held that the judgment is not vacated by such release, but should be rendered for the balance.

Such release can only be pleaded in satisfaction *pro tanto*.

ON FACTS agreed by the parties.

The action is DEBT upon a poor debtor's bond, and the facts appear in the opinion of the court.

Wm. Fessenden, counsel for the plaintiff.

E. Kent, counsel for the defendant.

CUTTING, J. It appears that at the October term of this court, a judgment was recovered in favor of the plaintiff, against Mason and others, for the sum of $502 damages, and $7,33 costs of suit. That on an execution duly issued on that judgment, Mason was arrested by the officer, and on October 5, 1853, was liberated by giving the bond now in suit, the condition of which was, that he should in six months take the oath prescribed by law, pay the debt, or deliver himself into the custody of the keeper of the jail. And it

does not appear that within the six months he fulfilled the condition. Consequently the bond became forfeited, and according to the provision of R. S., ch. 148, s. 39, judgment should be rendered against him and his co-obligors for the amount of the execution, costs, &c., unless they can show a legal defence against the recovery of the whole or any part.

On March 8, 1855, when this suit was commenced, the plaintiff's claim under the statute remained unaffected by any act of either party. It is now contended, that by reason of certain subsequent proceedings instituted on behalf of the judgment debtors, and action taken thereon by this court, the judgment named in the bond has been vacated, released, or so diminished as to have lost its identity. Neither of which positions can be maintained.

It is agreed that "the record of the original judgment corresponds with the recitals in the execution, and on the margin of said record are the following words: One-half of this judgment released by order of court, April term, 1856. See No. 252 of that term—Dole et als., petitioners, v. J. W. Carr." Under which is the following entry: "Review granted, unless one-half of the judgment sought to be reviewed is released in thirty days." And it further appears that, in pursuance of the order, written releases were duly filed by the party of record and also by the party in interest.

Now what was the legal effect of this release? It could not operate to reverse the judgment, for that could be done only on a writ of error. It might be rendered null perhaps by a judgment under the statute wholly in favor of the plaintiffs in review. *Dunlap* v. *Burnham*, 38 Maine R., 112. The entry in the margin of the record could have been designed only as a reference to the order under the petition, which was that one-half of the judgment should be released. The judgment was not thereby vacated; a subsequent action might have been brought upon it, and a release would not have sustained the plea of *nul tiel record*, but must have been pleaded in discharge. 1 Chit. Plead., 481. And under such a plea, evidence of a release of a part could not be extended

by implication so as to release the whole. The legal operation of the release was only to be in satisfaction and discharge of a moiety of the judgment, which probably was, originally recovered for a moiety too much. It was designed to obviate the necessity of a new trial.

What might have been the result of all the proceedings subsequent to the breach of the bond, if the plaintiff had claimed judgment under s. 39 of the chapter before cited, it becomes unnecessary to inquire, since in *good faith* he demands judgment only for one-half of his debt, costs and legal interest, which he is entitled to recover; and for that amount the defendants must be *defaulted.*

PRESERVED B. MILLS *versus* JOHN RICHARDSON.

A tenant in common of undivided lands is liable to treble damages for cutting timber on the common estate without proper notice, or for cutting during the pendency of a petition for partition.

Trespass *quare clausum* is the proper form of action to recover such damages.

TRESPASS *quare clausum* against the defendant, who was part owner, in common with the plaintiff, of the lot on which the cutting of timber was alleged.

APPLETON, J., presiding at *Nisi Prius*, to whom the action was referred, with the right to except to his rulings of the law reserved, determined that the action in this form could be maintained. EXCEPTIONS to this ruling were taken by the defendant.

A. G. Wakefield, counsel for the plaintiff.

S. H. Blake, counsel for the defendant.

HATHAWAY, J. By R. S., ch. 129, s. 7, a tenant in common of undivided lands is subjected to the forfeiture and payment of treble damages for cutting timber, &c., on the common

estate, without having given the preliminary notice required by the statute; or, for cutting timber, &c., on the same estate pending a petition for partition.

The only question *of law* presented by this case, is, whether or not an action of trespass *quare clausum* can be maintained to recover such damages, and that question has been decided in the affirmative by this court in *Maxwell* v. *Maxwell*, 31 Maine R., 184.

Exceptions overruled.

Judgment of the court at Nisi Prius affirmed.

JOHN NOWELL, *Pet'r for Review, versus* ABRAHAM SANBORN.

There is no provision in our statute in direct terms, as in Massachusetts, that "if judgment is recovered against several defendants in the original action, any one or more of them may review the cause, in like manner as if he or they had been the only defendants therein."

Whether s. 10 of ch. 124, which provides that "The party prevailing in the review shall recover his costs, but this shall not prevent the court, when granting a review on petition, from imposing on him such terms as to costs as they may deem reasonable;" may be considered as a substitute —QUERE.

Where the petitioner in review, being one of several joint defendants, defaulted in the original suit, files a bond of indemnity against damages and costs, it may be a sufficient protection to his associates to entitle him to a writ of review.

PETITION FOR REVIEW.

ON EXCEPTIONS to the rulings of APPLETON, J.

The petitioner proved by the records of the court that the respondent sued out his writ of attachment against Ebenezer H. Scribner, Daniel H. Weeks, and said Nowell, as former partners, under the name and style of Scribner, Weeks & Co., on a note signed by Scribner, Weeks & Co., returnable to the January term, 1853, of said court, (and that return of service was made thereof as alleged in said petition;) that the respondent recovered judgment against said Scrib-

ner, Weeks and Nowell, on default, they making no appearance at said January term.

The respondent moved that the petition be abated or quashed by the court, because it was brought by said Nowell, one of said defendants, alone, and not by all of said defendants. The court overruled the motion. Other testimony was introduced by the petitioner, to show that he had no notice of the action, and was not a partner of Scribner & Weeks.

The court granted the review.

To this ruling of the court the respondent excepted.

Rowe & Bartlett, counsel for the petitioner.

The statute of 1821, ch. 57, ss. 1 and 3, authorizes the party aggrieved by any judgment to petition for a review.

Where there are several defendants, one of them may be the only party aggrieved. The judgment may be in favor of the other defendants, or, as in this case, it may be for the interest of the other defendants to have their co-defendant, who is not in law liable, held jointly with them to satisfy their debt.

R. S., ch. 123, s. 1, is more liberal, and uses broader terms than the statute of 1821: "whenever the court shall judge it reasonable, and for the advancement of justice, without being limited to particular cases," a review may be granted.

There is nothing in the statute restricting the right to petition for, or the power to grant reviews, to cases where all the defendants unite in the application.

Nor is there any such restriction in cases where a review is a matter of right. By R. S., ch. 115, ss. 3 and 7, it is provided in certain cases where the defendant has been defaulted, not having had notice of the suit, that he shall be entitled to a review as of right. Can it be contended, that one of several defendants would be deprived of this right, by the fact that his co-defendant had notice?

In the case of *Emerson and three others, plaintiffs, in review*, v. *Potter and wife*, 1 Mass. R., 482, one of the defend-

ants in the original review, Emerson, brought the review without the consent of his co-defendants. The question of his right to do so, was not raised in that case, nor to our knowledge in any other.

A. Sanborn, pro se.

The defendant, in review as plaintiff, in the original action recovered judgment against said John Nowell, E. H. Scribner, and D. H. Weeks, in the Supreme Judicial Court, January term, 1853.

And now John Nowell, one of said defendants, alone, without joining his co-defendants, brings this petition to review the action. Can he maintain it? Is he entitled to the review?

The statute of this state, in force when this petition was instituted, provided, "that no more than one review shall be granted in the same action." R. S. of 1840, ch. 124, s. 5. And the statute now in force has substantially the same provision. R. S. of 1857, ch. 89, s. 1.

Now, if one of several defendants may maintain his sole and several petition for review, each one of the other defendants may severally do the same thing, since all have equal rights, and there may be as many reviews of the same action as there are defendants, and the same is true of plaintiffs. This would be in manifest contravention of the statute provisions aforesaid.

The statute of Massachusetts, by special provision, authorizes any one or more of several defendants to review an action. S. of 1835, ch. 99, s. 16.

The statutes of this state have been revised twice since 1835, once in 1840, and once in 1857, without any similar enactment. And it would seem that this repeated exclusion thereof from the statutes, is conclusive that the legislature deliberately intended to withhold and deny such authority.

This court has substantially decided that one of several defendants, or one of several plaintiffs, cannot solely and severally review an action, in *Elwell* v. *Sylvester*, 27 Maine R., 538. SHEPLEY, J., in giving the opinion of the court, says,

"there is no provision in the statute for the introduction of a new party." "Proceedings between the same parties only are contemplated by the statute." It follows, necessarily, that *all* the defendants, or *all* the plaintiffs, must join in a petition for review, or it will not be granted. The omission of one of the original parties is as fatal as the introduction of a new party. In either case, the review would not be between the parties to the original action. It is not too late to make the objection now. *Hall* v. *Walcott*, 10 Mass. R., 219.

CUTTING, J. In the original suit judgment was recovered on default against three individuals, alleged to have been co-partners and joint promissors, of whom the petitioner was one, who now claims a review of that action under R. S., ch. 123, s. 1, giving this court authority to grant reviews, "whenever they shall judge it reasonable, and for the advancement of justice, without being limited to particular cases."

It was contended at the hearing that one of several defendants could not maintain a petition for review in his own name; but the judge ruled otherwise.

By ch. 124, ss. 6 and 7, an action of review is to be tried on the issue joined in a former suit, or if the former judgment was rendered on default, the proper pleadings are to be made; consequently the original parties must be made the actors. *Elwell* v. *Sylvester*, 27 Maine R., 536.

It appears that two of the original defendants were duly summoned, who, together with the petitioner, were defaulted at the return term. The latter alleges that he had no notice of the pendency of that suit, and was aggrieved by that proceeding, of which fact the judge presiding, it would seem, was fully satisfied. But it is now contended that he is without relief, because the other two do not think proper to join him in his petition, being content, it is presumed, with the judgment as originally rendered, since they have the aid of a stranger to the contract in contributing towards its dis-

charge. To deny the prayer of the petitioner for such cause would leave him wholly without remedy.

On the other hand it may be said that the two debtors are not responsible for the wrong joinder of the third, and that it would operate a hardship to bring them again into court, and compel them, as co-plaintiffs in review, to defend the original suit, which might subject them to additional damages and costs. Our statutes, since the separation, have made no provision, in direct terms, for such a contingency. It has been otherwise in the parent state from 1786 to the present time. Mass. R. S. of 1836, ch. 99, s. 16, provides that, "If judgment is recovered against several defendants in the original action, any one or more of them may review the case, in like manner as if he or they had been the only defendants therein; and if the sum recovered in the original suit for debt or damages shall be increased or reduced on the review, the court shall take such order respecting the further proceedings as shall be necessary to carry into effect the two judgments, according to the rights of the different parties." Under a similar statute was the decision in *Emerson* v. *Pattee*, 1 Mass. R., 485.

What occasioned the omission of a similar section in our statute it is diffiult to perceive, unless s. 10 of ch. 124 may be considered as a substitute, which provides that "the party prevailing in the review shall recover his costs, but this shall not prevent the court, when granting a review on petition, from imposing on him such terms as to costs as they may deem reasonable." But this provision only refers to the subject matter of costs, and does not authorize the court to impose terms as to the increase of damages. We have serious doubts as to the correctness of the judge's ruling, and think that further legislation may become necessary to enable the court, as in Massachusests, to do exact justice to the different parties. This case, however, may constitute an exception. Here the two original defendants, who do not appear, were originally defaulted, and judgment was rendered on the amount of the plaintiffs claim in his writ, and on the

review they will probably submit to a like disposition; consequently they will suffer nothing from an increase of damages, and may only be liable to an increase of cost. And we perceive in the petition a prayer for a supersedeas of the execution which could be granted only upon condition that he had filed in court the statute bond, which might be an ample indemnity against both damages and costs, so far as it concerns the petitioner's associates. As to that fact, however, we are not judicially informed, otherwise than, perhaps, we are authorized to infer it from the absence of any adjudication as to costs. At all events the excepting party here has no occasion to trouble himself respecting the joint or several liabilities of the other party.

Exceptions overruled.

JOHN D. LUMBERT *versus* WILLIAM L. LUMBERT ET AL.

Where the owner of logs appears to contest a lien claim, he will not be permitted to file a separate plea, but may justify under the general issue and appropriate brief statement; and one verdict and special findings, under the direction of the court, is sufficient to establish the rights of all the parties.

This is an action of ASSUMPSIT, to recover for labor in driving logs on the Allegash waters, in the summer of 1854. The plaintiff claims a lien on certain logs described in the writ. After notice to them was ordered by the court, the owners of the logs appeared and entered their appearance on the docket by counsel, and waived any further notice to them of the claim on their logs, under the laws of the state, for the labor of the plaintiff. The owners of said logs filed two pleas in the case, one on behalf of the defendants, that they never promised, and one on the part of said owners, denying that any claim of lien ever existed. The presiding judge

ruled that the plea of the owners of the logs, denying the existence of the lien, would be disregarded in the trial of the cause, and decided that it was entirely irrelevant, that the issue must be under the plea put in for the defendants only.

The verdict was for the plaintiff. The defendants and owners of the logs excepted to the rulings of the court, in relation to the pleadings.

Rowe & Bartlett argued for the plaintiff.

The ruling of the judge in relation to the pleadings, was in accordance with the practice, as we understand it.

The ruling was similar in the case of *McPheters* v. *Lumbert*, argued here at the law term of 1856, in which case the court has since ordered judgment for the plaintiff.

Under that ruling it was unnecessary to prove that the attachment was made within sixty days after the arrival of the logs.

We do not see how the question of the sufficiency of the evidence to support the verdict, on the issue tried, comes up before the court; the case standing on exceptions to the ruling of the judge only.

G. W. Ingersoll argued for the defendants.

The defendants excepted to the ruling of the court, denying the log owners a right to plead under the statute of 1855, ch. 144, and make defence to the lien. It is conceived that many facts might be put in evidence between the owners and the plaintiff, that would not be relevant between the plaintiff and the defendants, to prove that no lien existed. The statute is of little use, if those most interested have no right to defend in their own names. If the owners are to be excluded from making any defence, except what they can do over the shoulders of the defendants, the statute is nullified. Most generally there is collusion in cases of this kind, between the plaintiffs and the defendants, to hold a lien, and force the owners to pay, when it belongs to the contractor to do it.

CUTTING, J. The only question properly presented is, as to the correctness of the ruling regarding the pleadings, since the whole evidence does not appear to have been reported, and there is no motion to set aside the verdict as being against evidence.

We have decided in the case of *Redington* v. *Frye*, 43 Maine R., 578, *that* under the statute of 1855, ch. 144, it is imperative on the plaintiff, who would enforce his lien claim on lumber, to cite the owner into court, that he may have an opportunity to defend the suit, and unless the notice prescribed by that statute has been given, or the owner has appeared, before judgment rendered, the lien is dissolved; *that* the owner having appeared and defended, or having had the notice and neglected, the lien judgment is conclusive upon him and his property, to which the lien is alleged to have attached; *that* the proceedings, so far as it regards the owner, are *in rem*, to protect which against the claimant, he may controvert any fact necessary to establish the lien; *that* to do this successfully, he must be allowed to become a party to the pleadings; otherwise his appearance might be more expensive than beneficial.

In this case the owners appeared and took upon themselves the defence, as they were authorized to do by force of the statute; and the case finds that "they filed two pleas; one in behalf of the defendants, that they never promised, and one on the part of themselves, denying the existence of any lien claim;" thereby presenting two issues to the country which would require two verdicts. This was not in conformity with the provisions of R. S., ch. 115, s. 18. Under the general issue and the appropriate brief statements, one verdict and special findings, under the direction of the court, would be sufficient to establish the rights of all the parties. For instance, on such an issue the jury might return a verdict for the plaintiff against the defendants, and at the same time find specially that the lien claim did or did not attach, which verdict and findings would be incorporated into the judgment, and thereby enlarge or limit ulterior pro-

ceedings. The second plea offered was not in bar of the action, and was properly excluded by the presiding judge.

Exceptions oevrruled.

HENRY WARREN, *in Error, versus* PHILIP H. COOMBS.

Error does not lie to reverse a judgment rendered on an agreed statement of facts; nor where the facts proved before the jury are reported by the judge, unless for an error disclosed by the record which will not be cured by a verdict.

No writ of error lies to examine a question of fact depending upon the evidence in the original suit, nor to examine mixed questions of law and fact.

REPORTED by APPLETON, J.

This is a proceeding in ERROR, to reverse the judgment of this court, in a suit in which Philip H. Coombs was plaintiff, and the said Warren defendant, under the provisions of the act of 1852, ch. 269, wherein the said Warren alleges that in the process, proceedings and judgment had before said court, at Bangor, aforesaid, at the January term of 1853, wherein said Coombs was plaintiff and said Warren defendant, there occurred the errors hereinafter specified, by which the plaintiff was injured, and for which he therefore seeks that said judgment may be reversed, recalled or corrected, as law and justice may require; that is to say, the following errors, namely:—For that the court, in their opinion at law upon the facts of said case, gave judgment to said plaintiff, for the reason that the case, as made up upon report, which did not show that the said Philip Coombs, to whom said land was taxed in 1839, was in possession of said land, and said Warren claiming title by virtue of a tax title inuring under an assessment to said Philip, of said land, in 1839, and although the case showed that the same premises were taxed to said Coombs in 1838, and for several next preceding years, and it not ap-

pearing that any notice had been given to change the same, by virtue of a statute then existing, which is now in force in R. S., ch. 14, s. 54, which said statute the court overlooked.

For that the court in said case gave judgment against said Warren, because said P. Coombs was not in possession of said premises demanded in 1839, to whom they were assessed, notwithstanding the land did not require such a possession, the court overlooking a statute then in force, to the effect that no such possession was required, for that said Philip Coombs was in actual possession of said demanded premises in the year 1839, and when assessed to him that year, and said fact was so testified to by the witness, Japheth Gilman, whose testimony to that effect is omitted from the report of testimony of the case, as reported by the presiding judge, was by an oversight or mistake, which was unintentional, and should be corrected.

The defendant in error pleads in *nullo est erratum.*

The plaintiff in error offered the report in the original suit, Coombs v. Warren, as signed by the presiding justice, TENNEY; the record and proceedings therein including the case *Coombs* v. *Warren,* 34 Maine R., 89, embracing the opinion of the court and the judgment thereupon, and it appeared that "the assessments of taxes for the years 1837, 1838, and 1839," mentioned in such report, were made to Philip Coombs, in each of these years.

Howard & Strout, counsel for the plaintiff.

Fessenden and *Garnsey,* counsel for the defendant.

RICE, J. Error does not lie on a judgment rendered on an agreed statement of facts, submitted by the parties for the opinion and decision of the court. *Alfred* v. *Saco,* 7 Mass. R., 380; *Carroll* v. *Richardson,* 9 Mass. R., 329; *Gray* v. *Storer,* 10 Mass. R., 163. Nor where the facts proved before the jury are reported by the judge. *Johnson* v. *Shed,* 21 Pick. R., 225. Unless it be for an error disclosed by the

record, which will not be cured by verdict. *Smith* v. *Morse*, 6 Maine R., 275.

No writ of error lies to examine a question of fact depending upon the evidence produced in the original suit, nor to re-examine a mixed question of law and fact. *Campbell* v. *Patterson*, 7 Vt. R., 86.

The plaintiff in error desires to re-examine the evidence produced in the original action, and to revise the decision of the court in that case as rendered upon the report of the presiding judge, on the ground that the court came to an erroneous conclusion upon that evidence. To do so would establish a rule by which every judgment rendered by the court, within the statute of limitations, would be open to examination on a writ of error, by the party thinking himself aggrieved by the decision of the court or jury. This will not do. There must be some end to litigation.

Judgment affirmed.

CUTTING, J., having been counsel in the original action, did not sit at the hearing.

LORE ALFORD, *Admin'r in Equity, versus* JAMES MCNARRIN.

The answer of a respondent to a bill in equity will be taken as true, unless from a consideration of the facts and circumstances admitted or proved, the contrary clearly appears.

BILL IN EQUITY.

The facts necessary to a full understanding of the case are stated in the opinion of the court, and need not be repeated here.

Neither is it deemed important to insert a synopsis of the voluminous testimony or able arguments of counsel, as the decision is based upon the consideration of the evidence in the case.

N. Wilson, solicitor for the complainant.

A. H. Briggs, solicitor for the respondent.

GOODENOW, J. The plaintiff is the administrator of one Guy C. Cargill, who was a creditor of one William Irving, now deceased, and who caused two executions in his favor against the said Irving, to be levied on the land in question, on the 7th day of December, 1848, as the property of said Irving. The bill alleges, that on the 8th of November, 1826, Irving was possessed of the land, "or parcel of land, number four, situate in the then town of Orono (now Oldtown), and conveyed the same to one John Barker, by deed of mortgage; that subsequently said Barker assigned said mortgage and the note unpaid, to one Jonathan P. Rogers, who on the 23d of June, 1833, conveyed by deed the same lot to the respondent, who gave back his note and deed of mortgage of the same for a part of the purchase money.

The plaintiff charges, "that the reason for said conveyance being made to said McNarrin was and is, that the said Irving had become involved in the lumbering business, and did not dare to hold property in his own name, and said respondent being a brother-in-law of said Irving, it was understood and agreed, that the conveyance from Rogers should be made to respondent, but for the exclusive use and benefit of said Irving, to secure the same from said Irving's creditors, and to prevent the seizure of the same by attachment or levy on execution."

The bill prays, that the respondent may, upon his oath, make answer to all and singular the matters and things charged and alleged in the same.

The answer admits that the conveyances and extents of executions were made at the times and in the manner alleged in the bill, and states particularly the ways and means by which the respondent paid said Jonathan P. Rogers for the property conveyed to him, which he claims to hold. But the respondent, in his answer, "utterly denies that the reason of said conveyance to him from said Jonathan P. Rogers

was, that said Irving had become involved, or did not dare to hold property in his own name; and denies most fully, positively and explicitly, that it was understood or agreed between him and the said Irving, or with any other person, that the conveyance should be made to this respondent, but for the exclusive use and benefit of said Irving, or to secure the same from said Irving's creditors, or to prevent the seizure of the same by attachment or levy on execution."

From a careful examination of the evidence in the case, and consideration of the facts and circumstances admitted or proved, we are unable to come to the conclusion, that the answer of the respondent, in its material parts, is not true.

We are of opinion that the plaintiff has failed to prove, that the conveyance from Rogers to the respondent was fraudulent and void as to the creditors of Irving; or that the respondent held the land so conveyed to him by Rogers in trust for Irving; or in fraud of his creditors.

The bill must therefore be dismissed, with costs for respondent.

EDWARD R. SOUTHARD *versus* JOHN B. HILL.

A plea in abatement of the writ, may be both of the writ and declaration, where it is intended to plead in abatement only of a *part* of the writ, and to *some of the counts* in the declaration.

If one tenant in common only be sued in trespass, trover, or case, for anything respecting the *land* held in common, he may plead the tenancy in common in abatement.

There is a distinction between personal actions of tort and such as concern *real* property, and a plea in abatement for the nonjoinder of tenants in common of a dam, without an averment that the dam was real estate, was overruled on demurrer.

ACTION OF TRESPASS.

The defendant pleaded in abatement the nonjoinder of

other persons, but did not aver that the dam concerning which the trespass was alleged was real estate.

The plaintiff demurred to the plea in abatement, and the defendant joined the demurrer.

The judge presiding at *Nisi Prius* sustained the demurrer, and the defendant excepted.

E. Kent, counsel for the defendant.

Where one alone is sued in tort upon a cause of action arising out of or concerning real property, held jointly or in common by himself and another, the nonjoinder of the other tenant is pleadable in abatement, although the action sounds in tort. Gould's Pleadings, 282, s. 119; 1 Chitty, 79; Story's Pleadings, 101. The plea in this case follows the form in Story, and contains every allegation usual in such pleas.

To say that the dam and log sluice are not real estate is to beg the question. Dams and sluices are built upon land. Whatsoever is erected upon land becomes attached to it, and is appurtenant to and parcel thereof. This is the general rule. The only exception is where the ownership of the land is in one, and that of the building or structure in another. If such a state of facts were relied upon by the plaintiff, he should allege and show it in a replication to the plea. He well knew that on such a replication the deeds would be forth coming, showing the title to both to be in the same persons.

The case of *Sumner* v. *Tileston* is not in point. In that case the defendants pleaded the general issue. It did not appear by the plea whether the defence rested on the ground of ownership of land, or on other grounds. So that the case did not present the question of a tort, charged and justified by reason of the ownership of real estate. It might well be, as the court remark, that the defence rested on a denial of the act charged to have been done. After plea pleaded and before the trial, one of the defendants died. His death was pleaded in abatement by the survivors. The court well held that the plea was not good, but it is fairly to be inferred

from the reasoning of the court, that if the defence had rested on a plea showing the joint ownership of the dam in question, the plea in abatement would have been sustained.

The doctrine in 14 Johns., 426, cannot be sound, if it goes, as it seems to do, to the extent, that if the plaintiff alleges what, in terms, amounts to the charge of erecting a nuisance, in a suit against one, he cannot plead that the act was done by himself and another as joint owners of real estate. It is true that such a plea will not justify what is really a nuisance, but the question whether the erection be or be not a nuisance, may often depend on the title to real estate. If the defendant so sued can justify the act done by reason of the ownership of the land, he should not be deprived of the aid of his co-tenant in the defence, merely because the act as set forth in the writ, and without explanation, might be held to be a nuisance. If the act be such that it may be justified by reason of the ownership of the land, the plea should be allowed. If it be such that no ownership of the land would justify it, then it is a nuisance, and the doctrine held by the court in this case, will apply. The report of the case is meagre. There may have been facts apparent to the court which do not appear in the report, which would justify the conclusion.

As to the second and third points made by the plaintiff, it is sufficient to observe, that the distinction between the writ and the declaration or counts, once so material in the English practice, never prevailed in this country, and has gone out of use in England. It is therefore not usual to conclude with a prayer of judgment of the writ and declaration or counts, but the conclusion is usual to pray judgment of the writ.

When the writ is general and contains the same counts as the declaration, the conclusion should be that the writ abate. 2 Sand. on Uses, Notes, 209, a.

"If the plaintiff himself acknowledge his writ to be false in the whole or in part, the *whole* writ shall abate." 2 Sand. on Uses, Notes, 210, d.

If the demand in the plea be too large, the court may change it. Though the party demand judgment of the whole writ, the court may abate it in part only. Ib., 210, d.

As to the fourth point: the certificate of the oath is sufficient. "Sworn to before me" is an allegation of the entire truth of the whole plea. No particularity could make it stronger. It differs entirely from the form and effect of the oath in 31 Maine R., 302, which was as to knowledge and belief only.

I. Washburn, counsel for the plaintiff.

1. The nonjoinder of defendants, in personal actions for a tort, is not generally pleadable in abatement, and is never pleadable except where the defendants were *tenants in common of real estate. Low* v. *Mumford*, 14 Johns. R., 426; *Sumner* v. *Tileston*, 4 Pick. R., 308; Gould's Pleadings, ch. 5, s. 119, p. 282, of edition of 1832; same, ch. 4, s. 76—for the reason of the rule.

Now, neither the writ or the plea show the dam or log sluice to have been real estate. In fact they were not. But whether so or otherwise, in fact, is immaterial, because it is not averred, nor does it appear that they were such. For all that appears they were personal property.

Sumner v. *Tileston* is almost precisely like this case. There, as here, the plea in abatement was that others were tenants in common in a *dam*—there, as here, the plea was demurred to, and the demurrer was sustained.

Great strictness is required in pleas in abatement. Every essential fact must be alleged. That "technical accuracy is required, which is not liable to the most subtle and scrupulous objection." *Burnham* v. *Howard*, 31 Maine R., 569; *Adams* v. *Hodsdon*, 33 Maine R., 225.

2. To the first count there is no objection taken by the plea. Therefore, if one count is good or not objected to, the writ cannot be abated.

3. Where the matter in abatement goes to the counts or

declaration, the plea should conclude with a prayer of judgment of the declaration or counts.

4. The verification or certificate of oath as follows: "sworn to before me," is insufficient. 31 Maine R., 302.

GOODENOW, J. This is an action of trespass. The defendant pleads in abatement, the nonjoinder of certain other persons, named in his plea, as to the second, third and fourth counts of the writ, and takes no notice of the first count; and, in conclusion, prays judgment of said writ, and that it may be quashed, and for his costs. To this plea there is a demurrer and joinder.

It is undoubtedly true, that there is a settled distinction between mere personal actions of tort, and such as concern *real* property; and that, if one tenant in common only be sued in trespass, trover or case, for anything respecting the *land* held in common, he may plead the tenancy in common in abatement. It is also true, that as pleas in abatement delay the trial of the merits of the action, the greatest accuracy and precision are required in framing them.

A dam is not necessarily *real estate.* If built by one person, on the land of another, with his consent, it would be personal estate. The plea in this case does not aver that the dam was real estate. It is not therefore certain to every intent. The defendant is not at liberty in pleading to leave the question in doubt, whether the dam was or was not real estate; with an expectation that the plaintiff might open the way to remove that doubt, by a *replication* instead of a *demurrer* to the plea. And even if it could be reasonably inferred from what is before us, that the dam spoken of in the plea is real estate, we are not informed whether the trespass complained of by the plaintiff arose from acts of malfeasance, or from mere omission to perform a duty, or nonfeasance. We think there is good reason for the distinction in this respect, adverted to in *Low* v. *Mumford,* 14 Johns. R., 426. One reason why the plaintiff in an action *ex delictu,* should

not be required to include all the tort-feasors, is, that he may not know them, or be able to find proof against them. But where the *gist* of the action is that the defendants are proprietors of the land, and have neglected a duty incident to their title, it is otherwise. We are not assured by what has been legally presented to us by the pleadings in this case, that the title to the land on which the dam is erected, does come directly in question.

Mr. Chitty says, vol. 1, p. 451, that many of the decisions in the books as to the form of the plea, are no longer applicable, and now in general a plea *in abatement of the writ* may be both of the writ and declaration, and it must be so where it is intended to plead in abatement only of a *part* of the writ, and the cause of abatement arises only on *some of the counts* in the declaration. The insurmountable objection is, therefore, not so much to the form as to the substance of the plea. The plea in abatement is overruled.

Judgment, that the defendant answer over.

HARRISON G. O. MORRISON *versus* HIRAM CORLISS ET AL.

To save the forfeiture of a poor debtor's bond, some one of the alternative conditions of the bond must be performed *within six months thereafter.*

A disclosure *commenced*, but not concluded, and the oath taken within that time, although done on the day following, is not a compliance with the conditions of the bond, where the creditor gives no assent thereto, so much as to entitle the debtor to "an assessment of the real and actual damages."

REPORTED by APPLETON, J.

The facts necessary to a full understanding of the case appear in the opinion of the court.

L. Barker, counsel for the plaintiff.

J. Bell, counsel for the defendant.

APPLETON, J. This is an action of debt on a poor debtor's bond, bearing date March 12, 1853. Notice was given to the creditor to appear on the 12th of September, and hear the disclosure of his debtor. Upon this notice, he was present, and the hearing of the disclosure was commenced, but it was not completed, nor the oath taken, till the next day, to which it was continued by adjournment, without the consent of the plaintiff, and at the instance of the justices before whom the disclosure was had.

By R. S., ch. 148, s. 20, the conditions of the bond which the debtor, when arrested or imprisoned on execution, must procure to obtain his discharge, are, "that he will, *within six months thereafter*, cite the creditor before two justices of the peace and quorum, and submit himself to examination, and take the oath prescribed in the twenty-eighth section of this chapter, or pay the debt, interest, cost and fees, arising in said execution, or deliver himself into the custody of the keeper of the jail, into which he is liable to be committed under the said execution," &c.

To save the forfeiture of the bond, some one of the alternative conditions must be performed "within six months thereafter"—that is, after the date of the arrest. This the debtor has failed to do. The creditor must be cited, the examination had, and the prescribed oath taken within the time. By the certificate, as well as the evidence in the case, it appears that the oath was taken after the expiration of the time specified in the condition of the bond, within which it was to have been done. It matters not that the disclosure was seasonably commenced. It must be concluded and the oath taken. The language of the statute is explicit on the subject. It was for the debtor to take care that he cited the creditor in such season as would enable him to finish his disclosure within the time specified in the bond, given upon his enlargement from arrest. He has not done it, and the bond is forfeited.

This case is not like *Moor* v. *Bond*, 18 Maine R., 142. There the delay was had and the examination adjourned till

after the expiration of the six months, at *the request* of the creditor, and the court held in consequence thereof, that a strict performance of the bond was excused. But in the case before us, the adjournment was without the consent of the creditor. The magistrates, for their own convenience, were not authorized to extend the time of the bond, and the creditor in no way is found to have given his assent thereto.

The case is not within the statute of 1848, ch. 85, for there was no oath taken prior to the breach of any of "the conditions of the bond, so as to entitle the defendant to an assessment of the real and actual damages," by the jury or by the court, as is therein provided.

Defendants defaulted.

PATRICK GALLAGHER *versus* GEORGE N. BLACK.

Where the alleged acceptance of an order is ambiguous on its face, and can be explained so as to ascertain the true intention of the parties by parol testimony, it is properly admissible for that purpose.

If one refuses to accept an order, but writes upon it at the same time what may fairly be understood as an acceptance, he will be bound by it against a *bona fide* holder as though he intended to accept.

In the absence of evidence as to when or how the plaintiff obtained an order, where the acceptance would have been ineffectual in the hands of the original payee, he must prove that he became the owner at the date of the acceptance, and for a valuable consideration.

EXCEPTIONS were taken to the rulings of APPLETON, J., at *Nisi Prius.*

The action is ASSUMPSIT on an order in these words:

"MR. GEORGE N. BLACK—*Sir:* Please pay David McLoud, or bearer, eighty dollars, in June next, it being for work in the woods. THOMAS WILLIAMS."

April 1, 1854.

On the back of same are these words:

"April 4, 1854. Received five dollars, $5,00."

AUGUSTA, ME.

And also what the plaintiff contended to be the word "accepted," and what the defendant contended to be a part only of said word, and designedly obliterated.

It was admitted that whatever was written on the back of said order, was in the handwriting of the defendant.

The defendant testified, that the payee presented the order on April 4, 1854, and that at that time he refused to accept the order, and wrote a part of the word "accepted," by mistake, and at the same moment rubbed his thumb over the same, intending to obliterate it, and then wrote the other words, and that it was understood between him and the payee, that he would pay only $5,00 and no more, and that he never accepted it, but always refused to accept it, and one question was, whether it had been accepted or not.

There was no evidence of any kind tending to show when or how the plaintiff became the owner of it, saving what was to be inferred from the order and writ, if anything.

Among other instructions not complained of were these:

That if the defendant refused to accept, and wrote the word "accept" or "accepted," by mistake, and immediately erased or obliterated it, and indorsed $5,00, and it was perfectly understood between him and the payee that it was all he would pay, still as against a *bona fide* holder for consideration, if he so carelessly obliterated the word aforesaid that such a holder, without notice, would, while acting with ordinary care and prudence, have been deceived as to said intention to obliterate, from the appearance of the order, in such case the defendant would be bound just as much as if he had actually intended to accept and had accepted.

That in such case there being no evidence on the subject as to when or how the plaintiff got the order, it being now in his possession, the presumption would be that he became the owner at the date of the acceptance, and for a valuable consideration.

The verdict was for the plaintiff.

John A. Peters argued in support of the exceptions.

We contend that there was no presumption that the plaintiff became the holder before the maturity of the order. There are certain presumptions which we freely admit, because the cases are so uniform as to conclude us.

We admit that a person holding a note payable to bearer or indorser, is so far presumed to be the valuable and rightful owner of such paper that it will protect the maker in paying the same to them, if found in their hands over due. This is founded on a necessity, and is a presumption created to protect the maker. Mark the difference—protect the maker. A holder can protect himself. He can show where and how he got a note. A maker who has paid it cannot show where the holder obtained it. I do not find, on examination, that the cases proceed any further.

Next, I will admit (subject to a point taken hereafter,) that where a note is in the hands of an indorser, which has been negotiated by the regular indorsement of the payee, that *prima facie* it is presumed to have been indorsed at the date of the note, and for a reason which does not apply to a note payable to bearer and passed without an indorsement. It is a rule of law that where there are several contracts in writing upon paper, and the paper not showing to the contrary, each contract is presumed to attach to the date of the paper, if it has but one; thus a note is indorsed in blank. Now when was the indorsement made. Of itself it has no date. The note is dated January 1; therefore there is a conclusion that the indorsement was made then.

But with a note to bearer and no indorsement, it is otherwise. The same rule applies as to any personal property; title rests not upon an indorsement which is a contract in writing equivalent to a bill of sale, but rests upon such evidence as arises by possession.

What is such evidence? Why, possession is evidence of title from time of possession, against every person except one who proves a prior possession; and title commences from the date of such possession. And in case of property which passes by delivery, like a note or bank bill, a later

possession is better *prima facie* than an early one, because the bearer of it, by its own terms, is *prima facie* owner of it. But when did he become the bearer of it?—no evidence but possession. It is when he first proves a possession. And in this case it is proved to be at the date of the writ, long after the maturity of the paper. The presumption here is, that the plaintiff was the lawful possessor of the note, but there is no presumption that he secured it before the date of the writ. 9 Cush. R., 148, 476.

In another respect we maintain that the court were in error. And that is, that in this case there was a presumption that the plaintiff was a holder for a valuable consideration.

There might have been such a presumption, if we had not shown that there were facts constituting a defence against the original payee, upon the ground that Black never accepted the order.

As between Black and McLoud, the payee, McLoud's attempt to pass it off, if he did, as a *bona fide* and complete acceptance, was a fraud. There was no legal contract or consideration in such case.

The court say that if defendant refused to accept, and by accident left words on the order, which the payee endeavored fraudulently to use and pass off, that in *such case* the plaintiff would be presumed to have got it for a valuable consideration. This was wrong. *Perrin* v. *Noyes*, 39 Maine R., 384.

If our pretension is well founded, to wit: that there never was an acceptance, as understood by the payee, and if the payee passed it as an accepted order, was it not by him fraudulently put in circulation, as far as we are concerned?

The jury were clearly mislead. They supposed, and could not suppose anything else, that notwithstanding all the circumstances of this case, if all our proof was believed, still that the presumption weighed against us, and of course there was nothing to remove such presumption in the case.

C. P. Brown, counsel for the plaintiff.

CUTTING, J. At the trial one question submitted to the

jury was, whether the defendant had accepted the order. And under the circumstances it was a question proper for their consideration. The alleged acceptance was ambiguous on its face, and could be explained so as to ascertain the true intention of the parties by parol testimony, which was for such cause properly admitted.

The instructions of the judge to the jury, in substance, were—"that if the defendant did not accept, but refused to accept, and it was so understood between him and the payee, still as against a *bona fide* holder for consideration, if he so carelessly obliterated the word aforesaid, that such holder without notice, would, while acting with ordinary care and prudence, have been deceived as to said intention to obliterate, from the appearance of the order; in such case defendant would be bound as much as if he had actually intended to accept and had accepted. That in such case, there being no evidence on the subject, as to when or how the plaintiff got the order, it being now in his possession, the presumption would be that he became the owner at the date of the acceptance, and for a valuable consideration."

This charge embraces one error, which is as to the legal presumption. The evidence tended to show, and the charge assumed, that the acceptance would have been ineffectual in the hands of the original payee. In such event proof, to be produced by the holder, must be substituted for the presumption. This doctrine is now well established by reason and authority. *Munroe* v. *Cooper*, 5 Pick. R., 412; *Aldrich* v. *Warren*, 16 Maine R., 465; *Perrin* v. *Noyes*, 39 Maine R., 384; *Bissill* v. *Morgan*, 11 Cush. R., 198.

Exceptions sustained, and a new trial granted.

THATCHER CHICK *versus* FRANKLIN ROLLINS ET AL.

Upon trial of a complaint for flowing lands, where the issue involves the title to the premises, a judgment will be conclusive between the parties and their privies to the estate, and a title acquired after the commencement of the suit, cannot be introduced to defeat the claim of the demandant.

Neither can such title be available in defence, as showing a want of title in the complainants, where the parties are privies to a former judgment, and who had acquired no superior title prior to the commencement of the process.

Where a mortgager remains in possession for twenty years after the breach of the condition, without payment of interest or admission of the debt; the mortgagee will be bared of his foreclosure, unless the facts and circumstances are inconsistent with the presumption of payment of the notes.

This is a complaint for an increase of yearly damages occasioned by the flowing of the plaintiff's land by the defendant's dam.

REPORTED by CUTTING, J.

The plaintiff introduced the record and proceedings in the original complaint, which were in favor of Frederick A. Butman v. Hezekiah Winslow. Judgment was rendered in that case in this court, upon a verdict of damages assessed at one cent yearly.

It was admitted that the defendants succeeded to the title of Winslow, by conveyance prior to the complaint, viz.: May 19, 1855. The plaintiff then introduced the following deeds of warranty of the premises flowed, all duly recorded, viz.:

Frederick A. Butman to Elisha Piper, dated October 23, 1844.

Elisha Piper to Benjamin York, dated April 17, 1843.

Benjamin York to complainant, Thatcher Chick, dated November 11, 1844.

The defendants then introduced a warrantee deed: Edward Monroe to Bean & Gray, of the premises flowed, dated May 24, 1822.

Warrantee deed: Bean & Gray to John Durgin, dated February 3, 1824.

Quit claim deed: John B. Durgin and all the other children of John Durgin (except the grantor,) to James S. Durgin, dated March 8, 1856.

Quit claim deed: James S. Durgin to Franklin Rollins, one of the respondents, dated March 29, 1856.

Lease: Same to the respondents, dated March 29, 1856, of right to flow the same premises for ten years, and release of all claim for having flowed.

John B. Durgin, introduced by the defendant, testified, that he was one of John B. Durgin's children; that his father died twelve years ago; that his father once owned and occupied the premises flowed; that this was when he was not twenty-one years old; that he had not occupied it since.

Cross-Ex.—Frederick A. Butman occupied the premises, and others; it had shifted hands several times. Mr. Varney occupied it; also Mr. Piper and others.

James S. Durgin came to me and got the deed from me, last March; he paid me nothing for it.

Monroe Durgin, the youngest of the children of said John Durgin, is twenty-seven years old.

The plaintiff then introduced a mortgage from Bean & Gray to Edward Monroe, dated December 5, 1822, to secure certain notes, payable January 1, 1826.

An assignment of said mortgage: Edward Monroe to Samuel Butman, dated September 15, 1826.

Deed: Samuel Butman to Frederick A. Butman, dated June 15, 1830.

Several other deeds, conveying title from F. A. Butman; from several intermediate persons, among whom was Asa Varney, and finally back to Frederick A. Butman, by deed from Bartlett Jackson, dated April 18, 1838.

A. W. Paine, counsel for the complainant.

I. The plaintiff having succeeded to the title of Butman, and the defendant to the title of Winslow, the parties to this

suit are on both sides privies in estate to the parties in the former suit or complaint.

Such being the case, the parties here are concluded by the former judgment as to all the facts which entered into that judgment, or were necessary to its rendition. This was directly adjudged in *Adams* v. *Pearson*, 7 Pick. R., 341; and is substantially affirmed by *Charles* v. *Porter*, 10 Met. R., 37; and indeed is supported by the late decision of *Hill* v. *Sayles*, 4 Cush. R., 552, and *Pease* v. *Whitten*, 31 Maine R., 117. The principles of the last case go beyond those now contended for.

That the title is a matter directly in issue, and of course enters into the judgment, is a direct result of the statute authorizing the suit, which provides "that any person sustaining damages *in his lands*," &c., may obtain compensation, &c. R. S., ch. 126, s. 5. Also from s. 9, which provides "that the mill owner may appear and plead in bar that the complainant has no right, title or estate in the lands alleged to be flowed," &c. Here then there is a distinct provision, both on the part of the plaintiff and the defendant, for making the title a matter of adjudication in order to sustain the complaint. By the general principle of the cases cited, then, the present parties are concluded by the judgment in the original proceedings. This was in fact directly decided in *Knapp* v. *Clark*, 30 Maine R., 244; *Pierce* v. *Knapp*, 34 Maine R., 402.

II. But supposing it to be otherwise, and we are called upon here to make out our title. We claim that we have done so.

The original title, as both contend, was in Edward Monroe, from whom it passed to Bean & Gray, in 1822. Bean & Gray then mortgaged to the plaintiff's ancestor, and afterwards conveyed the right of redemption to the defendant's ancestor.

1. That mortgage still exists—never has been paid. No proof of payment is made, and there is nothing to discredit the fact. In order to support the mortgage, it is not nec-

essary to introduce the notes. It is for the adverse party to prove their payment. This has been directly adjudged by our court, in *Thompson* v. *Watson*, 14 Maine R., 316.

The notes cannot be found, and are therefore not produced. Thirty-five years' time and a favorable litigation has passed over them, and their existence is a matter of doubt. The facts show, however, that they have never been paid.

Thus the mortgage was given in 1822, to secure notes payable in 1826; by Monroe assigned to Samuel Butman, September 15, 1826; by S. Butman assigned to F. A. Butman, June 15, 1830, when several other conveyances were made; the estate then coming again back into F. A. Butman, April 18, 1838. Shortly after, F. A Butman, with no other than his title through this mortgage, brings his complaint October 1, 1839, and after a severe litigation for six years, judgment is rendered in his favor in October, 1845. Here is the first fact on which the court are called to decide, on the present validity of the mortgage.

2. Possession has always followed in Butman and his privies. F. A. Butman, Varney, Piper and complainant, and several others, being the several intermediate holders, have in the mean time occupied the land, showing that the mortgage and of course the notes are alive.

On the contrary, Durgin has not been in possession; never has been for any time since John B. was twenty-one, he being now forty-six years old. Here are twenty-five years of abandonment, showing a total want of interest and title.

3. And now that the title has been raked up, the heirs are found making deeds without consideration, thus demonstrating a total want of title, at least in the opinion of those who own it, if there was any title existing adverse to the mortgage which we set up.

From such facts as these, the court will presume the nonpayment of a mortgage, and that it is still in force. *Joy* v. *Adams*, 26 Maine R., 330.

III. The title which the defendant sets up under the deeds from Durgin, cannot avail him, it having been acquired since

the commencement of these proceedings. The date of our complaint is September 3, 1855; the date of Durgin's deed to the defendant is March 29, 1856. That this title cannot be admitted to affect the rights of the complainant here, is directly adjudicated in *Great Falls Company* v. *Worster*, 15 N. H. R., 414; *Curtis* v. *Francis*, 9 Cush. R., 427, 443; *Manning* v. *Laboree*, 33 Maine R., 343, 347.

The action properly brought, and the plaintiff's right is perfect. *Jones* v. *Pierce*, 16 Maine R., 411.

C. P. Browne, counsel for the respondents.

The principle that no person or party is bound by a judgment, to which he was not a party, or notified to appear, and did not appear or plead, and had no right to appear and plead, or be heard, is too familiar to require citing authorities on this point.

The defendants do not rely on any right or claim to this lot No. 76, coming to them from Winslow. Therefore litigation in relation to that lot, between Winslow and Butman, in years past, has no bearing upon the rights of these defendants.

It is pretended that these defendants are estopped in this case, by the proceedings and report of referees in the complaint, Butman v. Winslow. And the case of *Adams* v. *Pearson*, 7 Pick. R., 341, is relied on as authority on this point. But the court will at once perceive that that case and this are not analagous. There, the second case for increase of damages, was between the original parties; and it was well held, that the defendant, having had one full and fair trial, and a judgment against him, was estopped to controvert the question again. The court say he cannot, for "otherwise there would be no end of controversies."

It is clear that there is a very broad difference between that case and this.

The original case, Butman v. Winslow, simply decided that, *as between* Butman and Winslow, the former had the better title, but as between Butman and any other party, *but*

Winslow, or one claiming to derive his title to *this* lot from him, the question is left *open*, by that decision.

The defendants do not claim title to this lot from Winslow; therefore they are not affected by that judgment.

Will it be pretended, that by that decision Butman got a good title against the world, when it appears that the fee simple title was in John Durgin, at the time that case was being litigated, and he had no knowledge of it whatever? Clearly not, and if he was not bound by it, then his grantee is not.

This case is more like that of *Pike* v. *Galvin*, 29 Maine R., 183, and the authorities therein cited I refer to. In that case the whole question is elaborately discussed, by Judge SHEPLEY, as to subsequently acquired title, after having made a conveyance of the premises. And the conclusion of the court is, "That one having conveyed land by deed, with covenants of warranty, *then* having no title, but subsequently obtaining title, this latter title inures to his grantee, and perfects his title." But if his deed of conveyance does not contain such covenants, a title subsequently obtained does not inure to his original grantee.

Now, on this principle, a judgment against a party cannot be said to be more conclusive against him than his quit claim deed.

If the title is shown to be in the defendants, the plaintiff cannot recover. If the title is shown to be in John Durgin's heirs, when this process was commenced, the plaintiff cannot recover. For neither being in the *actual* possession, the plaintiff must recover on the *strength* of his own title.

The report of the case is silent on the point as to who is in possession. This court cannot therefore infer that either of these parties is in actual possession. But if it shall be said, that the court will presume *that* party in possession who shows the better title, then the question again recurs, which has the legal title?

The defence relies on the title of Edward Monroe, conveyed to Gray & Bean—by them to John Durgin. By the

decease of Durgin, the estate vested in his children as heirs at law, who are shown to be those named in the case, viz.: John B., James S. and Munroe Durgin, and Mrs. Heald, and by them to the defendants. If the court find the title to have been in Durgin's heirs, at the time this process was commenced, (if the question, as tried and decided, is to relate to the point of time when this process is dated,) *then* the plaintiff cannot recover. If the defendants hold the title, or by virtue of the lease to them, or the release from Durgin's heirs, the claim for flowage is discharged, *then* the plaintiff cannot recover.

If the plaintiff holds the title to this land, even though he be out of actual possession, I admit he can recover.

The title is not in the plaintiff, unless it is in him by virtue of the original mortgage, from Bean & Gray to Monroe, given in 1822, and by that his only claim can be as assignee of the mortgage. No foreclosure.

Is that mortgage here before the court a legal, a valid mortgage? Is it to be regarded as upheld, or dead?

It was executed more than thirty years before the date of this process, for the express purpose of securing four promissory notes therein named. These notes, by their terms, fell due four years subsequently to their date. The presumption is, they were paid and canceled at maturity. The presumption is, that Gray & Bean were able to fulfill their contracts, and did so, and paid these notes.

The original mortgage is presented to the court. But the notes are not here. Not a word of evidence of the existence of those notes is offered here by the plaintiff, since they became payable; no excuse or reason assigned, or attempted to be assigned, why these notes are not here.

"A mortgage has no validity after the debt secured by it has been paid." *Williams* v. *Thurlow*, 31 Maine R., 392.

"The lapse of twenty years furnishes a legal presumption that a debt, though secured by a mortgage, has been paid." *Sweetser* v. *Lowell*, 33 Maine R., 446.

This case is much stronger than that just cited. In that

the note was before the court, but more than twenty years had elapsed since its maturity. The court held it to be presumed to be paid, but that this fact might be rebutted by the plaintiff.

In the case at bar, more than thirty years have elapsed, and not only no evidence is put in that the debt is still due, but the notes are not even in existence.

In *Joy* v. *Adams*, 26 Maine R., 333, the court say, "The mortgager, or his grantee, may allege payment, and for proof rely on the lapse of time, when it amounted to twenty years from the accruing of the indebtment."

"Such a lapse of time," the court say, "has been deemed sufficient for the purpose, in the absence of any countervailing considerations."

"This is admitted as a presumption of law, which may be removed by circumstances tending to produce a contrary presumption." Here far more time has elapsed, and there is not a single countervailing circumstance. Even the notes are *gone*.

"If the mortgage debt has been paid, no action can be maintained on the mortgage, even though it has not been formally discharged." *Hadlock* v. *Bulfinch*, 31 Maine R., 246.

From these authorities, it is clear, that these defendants are not estopped by the proceedings in the suit, Butman v. Winslow, as they neither take or rely on any title or right to this lot, No. 76, from him, but obtain their right from another and entirely distinct source.

It is also clear, that the title to this lot passed out of Edward Monroe, May 24, 1822, and has been transmitted direct to these defendants—at least, direct to John Durgin's heirs, and either *they* or the defendants hold the title at this time.

If this case shall be decided as relating to the point of time when this suit was commenced, then the title was in Durgin's heirs, and the plaintiff, not having *the title* or *possession*, cannot prevail in this suit. If the question is decided as relating to the point of time when this case was reported, October 7, 1856, then the title was in the defendants, and all

claim for damages being released to the defendants, for flowing, the court will not appoint commissioners to fix future damages.

Both plaintiff and defendants claim title from Monroe—the plaintiff by virtue of the mortgage of December 5, 1822, and that, as has been shown, having been discharged, the plaintiff fails to establish title, and must fail in this suit.

The cases cited by the plaintiff, from 10 Met. R., 37, and from 4 Cush. R., 582, relate to the effect of a judgment between the original parties, and are not controverted in this case.

The case of *Thompson* v. *Watson*, 14 Maine R., 316, does not militate against this case. There the mortgage had been but recently made, and it does not appear whether the notes were in the case or not.

Here the notes were given more than thirty years, and the law presumes payment after twenty years, and the burden is thrown upon the defendants.

The case of *Pierce* v. *Knapp*, 34 Maine R., 402, simply decides that a judgment for flowage is a charge upon the mill estate, and that the assignee is holden to pay the yearly damage. But the question of his right to set up a distinct title, where a new complaint is filed, is not presented in that case.

The case of *Manning* v. *Laboree*, 33 Maine R., 343, turned upon the pleadings; but the broad difference between that case and the case at bar, is, that there the plaintiff had title, if the defendant's title, acquired after suit, was not valid; here, if the defendant's title is not good, for the reason that it is acquired since the date of this suit, then the title is in the Durgin heirs, and the defendants being thus without lawful title, and not being in possession, cannot prevail.

It has been said that the lapse of time since John Durgin occupied is an argument of the payment of these notes. It will be noticed that only ten or twelve years elapsed, before his death, and his heirs minors, one only being *now* twenty-seven years of age.

Chick *v.* Rollins.

TENNEY, C. J. Frederick A. Butman, in the year 1845, obtained judgment in this court, against Hezekiah Winslow, on a complaint under ch. 45, of the statutes of 1821, (R. S., ch. 126,) entitled "an act for the support and regulation of mills." Under that judgment Winslow was bound to pay the sum of one cent, as the yearly damage for the flowage of the land, to which it was adjudged Butman had title.

Butman transmitted his right on the premises, so that through several mesne conveyances, the title is in the present complainant. It is admitted that the interest of Winslow in the dam, &c., is now in the respondents, under a deed dated May 19, 1855. This complaint, which is dated September 3, 1855, is under the act referred to in the Revised Statutes, for an increase of the yearly damage, occasioned by the flowage of the land by the same dam.

It is conceded by the respondents, that they could have interposed no valid objection to the proceedings prayed for in the complaint, if they had no other and greater rights than those which Hezekiah Winslow originally had. But they now claim an absolute title in the premises flowed, which came directly from the heirs of one who was a stranger to the proceedings under the original complaint, in addition to their title in the mills, dam, and mill privilege.

The right under which the respondents would now defend, is that which it is alleged that John Durgin, deceased, held at the time the original complaint was filed, from whose heirs Franklin Rollins claims to have derived a title to the premises, by deed, dated March 29, 1856. The respondents also claim the right to flow the land for the term of ten years, by virtue of a lease, from the heirs of said Durgin, in which lease there is a discharge of all right to recover damages for previous flowing. This lease bears a date similar to that of the deed to Rollins.

It is insisted by the complainant, that whatever rights may have been acquired by the respondents from the heirs of John Durgin, they, having been obtained since the institution of the present suit, cannot be a defence thereto.

The respondents contend, that this newly acquired title, being pleaded, is a bar to the complaint. The case, as it is now presented, is in its nature a real action. The issue is touching the title to the premises. If a trial and a judgment upon that issue should follow, it would be conclusive between the parties and their privies. It is well established, that a title, in such actions, acquired after the commencement of the suit, cannot be allowed, to be introduced to defeat the claim of the demandant. In the case of *Andrews and ux.* v. *Hooper,* 13 Mass. R., 472, WILDE, J., in delivering the opinion of the court, says, "The evidence of title, thus acquired, has been, I believe, uniformly rejected by the courts." And it is said by SHAW, C. J., in the opinion of the court, in *Curtis* v. *Francis,* 9 Cush. R., 427, referring to this principle, "It is now a rule of law, well settled by authorities."

It is insisted in behalf of the respondents, that if they are precluded from setting up the title of Durgin, acquired by them since the commencement of this suit, it is available in defence, as showing a want of title in the complainant. The former judgment in favor of Butman v. Winslow is properly admitted by the respondents to be conclusive upon them, as the grantees under Winslow's title. This judgment cannot be overhauled, between parties who are privy thereto, and who had acquired no superior title before the commencement of this process. Such a course of proceedings would have the effect of a new trial; and if the respondents should prevail, two inconsistent judgments upon the title to the premises might stand upon the record, in what is substantially the same case.

The result to which we have come, is a final disposition of the issue, upon the title of Durgin, set up in defence, and would entitle the complainant to have the damages arising from the flowage of the premises appraised. But the question whether Franklin Rollins has at this time a title to the premises, has been argued, and it is proper that it should be examined.

Edward Monroe conveyed the premises by deed, dated May 24, 1822, to Bean & Gray, who, on December 5, 1822, reconveyed the same in mortgage to Monroe, to secure the payment of certain promissory notes, payable January 1, 1826. The evidence introduced and reported shows that the complainant has the rights of the mortgagee, and that Rollins has those of the mortgager, whatever those rights may be. The notes referred to in the condition of the mortgage are not produced, and it does not appear from the case whether they were actually paid or not.

Bean & Gray conveyed their right to John Durgin, by deed, dated February 3, 1824. Parol evidence was introduced, showing that Durgin once owned and occupied the premises; that he has not occupied them since the year 1831, even if he continued in the occupation till that time; and that he died about the year 1844. There is no evidence whatever that he, his heirs, or any one under him or them, or in behalf of either, have claimed title thereto, or been in possession, prior to the conveyance of his right to Franklin Rollins.

The mortgage to Monroe was assigned to Samuel Butman, on September 15, 1826, and the assignee, on June 15, 1830, conveyed by absolute deed to Frederick A. Butman. Other deeds were introduced, showing several intermediate conveyances to different persons, till the mortgage title is found in Frederick A. Butman, under a deed from Bartlett Jackson to him, dated April 18, 1838. It appears from evidence in the case, that the land was in the possession of F. A. Butman, and others, among whom were Varney and Piper, who had each at different times a deed thereof.

It is contended on the part of the complainant, that an indefeasible title had been obtained under the mortgage to Monroe, by a possession for more than twenty years, without any claim made under the mortgager. On the other hand it is insisted, that the same length of time having elapsed since the maturity of the notes referred to in the condition of the mortgage, they are presumed to have been

paid, and the mortgage extinguished; and in confirmation of this presumption, the non-production of the notes by the complainant is relied upon.

Judge STORY, in 2 Com. on Eq. Juris., s. 1028 (a), says: "In respect to the time within which a mortgage is redeemable, it may be remarked, that the ordinary limitation is twenty years from the time when the mortgagee has entered into possession, after the breach of this condition, under his title, by analogy to ordinary limitations of rights of entry, and actions of ejectment. If, therefore, the mortgagee enters into possession, in the character of a mortgagee, and by virtue of his mortgage alone, he is for twenty years liable to account, and if payment be tendered to him, he is liable to become a trustee of the mortgager, and be treated as such. But if the mortgager permits the mortgagee to hold the possession for twenty years, without accounting and without admitting that he possesses a mortgage title only, the mortgager loses his right of redemption, and the title of the mortgagee becomes absolute in equity, as it previously was in law."

In note (b) to the same section, it is said, "Limitations or considerations will, in many respects, apply to the right of foreclosure of a mortgagee. If he has supposed the mortgager to remain in possession for twenty years after the breach of the condition, without any payment of interest, or any admission of the debt, or other duty, the right to file a bill for a foreclosure will generally be deemed to be barred and extinguished. However, in cases of this sort, as the bar is not positive, but is founded upon a presumption of payment, it is open to be rebutted by circumstances."

Notwithstanding the lapse of more than twenty years since the maturity of the notes referred to in the condition of the mortgage, and the non-production thereof by the complainant, the facts and circumstances are altogether inconsistent with a claim by Durgin or his heirs under the mortgage. The inducement in Durgin to pay the notes, and thereby extinguish the mortgage, would extend to the taking

of possession of the land as the fruit of the payment. And the omission to do the latter, is very strong circumstantial evidence that he omitted to do the former. The motives which are supposed to have operated upon his mind, would influence the minds of his heirs after his decease.

During the time when Durgin and his heirs made no claim to the premises, and are not shown to have taken the least concern therein, we find them passing by absolute deeds from one to another, whose claim was under the mortgage. Piper had a deed from F. A. Butman, whose title was from the assignee of the mortgagee, as early at least as 1844, and he is shown to have been in the occupation, as well as Butman, and Varney, who had title to the land by deed; and various other persons have been in possession, as one succeeded the other, by absolute conveyances.

It cannot be doubted, that Durgin released his right in some manner, that he abandoned the premises, and never resumed the possession thereof, or that the mortgage to Monroe was foreclosed. The ground taken by the respondents is, that the right of Durgin remained in him and his heirs, till the conveyance of that right on March 29, 1856. If so, the facts clearly show an abandonment on his part, and that of his heirs. And though it is not expressly proved, that there was a continued possession of the complainant and those under whom he claims, yet the facts upon this matter, in connection with absence of all proof of the assertion of any right whatever under the title claimed by the respondents, leave little doubt that a possession under the mortgage, from 1831 to the date of this complaint, actually existed. Whether it was so or not, is not material for the disposition of the case as it is now before us. The presumption of the payment of the notes being rebutted from evidence reported, the title has become absolute in the complainant, under the mortgage, to the premises, or the mortgage is still open to redemption. The absolute rights of the parties, as they respectively claim under the mortgagee and the mortgager, we cannot now definitely determine. But the title under the

former proceedings between Butman and Winslow being settled, as between these parties, the complainant is entitled to

Judgment for an appraisal of the damages, according to the prayer in his complaint.

NATHANIEL WILSON *versus* JABEZ H. SOPER.

Where the tenant holds under a sale of the right in equity of redemption, he will not be ousted by one who has not the record title to such redemption, although he may have previously paid the mortgage.

This case was REPORTED by APPLETON, J., and is brought upon a WRIT OF ENTRY to recover possession of lands in the town of Stetson. Plea, *Nul disseizin.*

The demandant claims title under a mortgage deed of the demanded premises from D. L. & C. W. Whiting, to E. G. Allen, dated April 18, 1850, acknowledged May 9, 1850, and recorded May 28, 1850, together with seven notes described in said mortgage and secured thereby, given by said Whitings to Allen, for $100 each.

An assignment of said mortgage by E. G. Allen to Nathan H. Allen, dated February 1, 1855, and recorded February 21, 1855, and a deed of an assignment of the same from N. H. Allen to the demandant, dated February 9, 1856, acknowledged the same day, and recorded November 24, 1856.

Also an order from E. G. Allen on E. S. Coe, to deliver the notes above named to N. H. Allen, bearing date December 2, 1854, and by him indorsed to demandant. Also a record of the foreclosure of a mortgage of the same premises, from E. G. Allen to David Pingree and E. S. Coe, dated November 8, 1843, recorded November 11, 1843, and an assignment of the same from said Pingree and Coe to Lewis Barker, dated September 19, 1854, recorded September 29, 1854.

Evidence was introduced tending to show payment of the Pingree and Coe mortgage to Barker.

The tenant introduced a warrantee deed from Benjamin Crockett to E. G. Allen, of the demanded premises, dated November 8, 1843, recorded November 11, 1843. Also a mortgage of the same premises, and notes thereby secured, from E. G. Allen to Pingree and Coe, dated November 8, 1843, recorded November 11, 1843. An assignment of the same from said Pingree and Coe to Lewis Barker, dated September 19, 1854, recorded September 19, 1854, with two notes described in said mortgage, given by Allen to Pingree and Coe, of same date as mortgage, $100 each, and interest annually, negotiated to tenant, upon which are two indorsements.

The tenant also introduced a writ, Thomas H. Shaw and George W. Merrill v. E. G. Allen, dated September 6, 1853, on which was attached all the right, title and interest which said Allen had to any real estate in Penobscot county, attachment dated and made September 13, 1853, judgment and sale of the equity of redemption, and a deed from the officer of the same; also a quitclaim deed from Shaw & Merrill.

N. Wilson, counsel for the demandant.

L. Barker, counsel for the tenant.

The tenant has the record title under the attachment and subsequent proceedings in the action Shaw & Merrill v. E. G. Allen, and the deed of Shaw & Merrill to him. He sets up no title under the Pingree and Coe mortgage, and only puts it into the case to show that there was an equity of redemption in Allen at the time of the seizure on the execution, and that the proceedings were therefore proper in the sale of the equity instead of by levy.

By the deed from Crockett, Allen derived title to the property in 1843. The only conveyance from Allen which the case discloses, as appearing of record, prior to the Shaw & Merrill attachment, is the mortgage to Pingree and Coe.

From the fact that Allen received a mortgage from the Whitings, of the same premises, in 1850, one might infer that he had previously sold the property to them, but no deed is offered, and the case nowhere shows that any deed was given. If it ever was given it was never recorded, and can have no effect against the creditors of Allen.

Shaw & Merrill, in examining the records, trace title into Allen, and unless the records show that title out of Allen, their attachment must hold.

The cases, *Roberts* v. *Bourne*, 23 Maine R., 165; *Veazie* v. *Parker*, 23 Maine R., 170, and *Veazie* v. *Taylor*, 23 Maine R., 246, are all precisely in point, except that they show a deed from the debtor, recorded after the attachment, where as in this case, there is no scintilla of proof that Allen had ever conveyed his equity prior to the attachment.

HATHAWAY, J. E. G. Allen, in November, 1843, conveyed in mortgage, to Pingree and Coe, a lot of land in Stetson, including the demanded premises, which mortgage was duly recorded, and was subsequently assigned to Lewis Barker in September, 1854, and the assignment thereof recorded. In September, 1853, Shaw & Merrill, creditors of Allen, attached on *mesne process* his equity of redemption of the mortgaged premises, which was, in due course of legal proceedings, sold on their execution against Allen, at sheriff's sale, and purchased by them in July, 1856, and in August, 1856, was conveyed by them to the tenant, who was in possession of the demanded premises by permission of Barker, the assignee of the mortgage.

The demandant claims title as assignee of a mortgage made by D. L. & C. W. Whiting, to E. G. Allen, in April, 1850, which, by mesne conveyance was duly assigned to him in February, 1856, and on the day of the sale of the equity of redemption he tendered to Barker the amount due on the mortgage to Pingree and Coe, and Barker received it; but that could not effect the tenant's rights, for his title to the right of redemption was, by virtue of his deed from Shaw &

Merrill, by whom it had been acquired, in pursuance of their previous attachment.

The demandant claims that Allen conveyed to the Whitings on the day of the date of their mortgage to him, and that their mortgage was made back to him to secure the purchase money, and that he therefore, as assignee of that mortgage, had the right of redemption, which could not be defeated by the subsequent attachment of Shaw & Merrill.

But the case finds that the *record title* to the equity of redemption was in Allen, when Shaw & Merrill attached, and furnishes no legal evidence of any deed, or notice to them of any deed from Allen to the Whitings, which could defeat their attachment of the equity as the estate of Allen. 23 Maine R., 165, 170, 246, cited by defendant's counsel. *Spofford* v. *Weston*, 29 Maine R., 140; *Abbott* v. *Sturtevant*, 30 Maine R., 40.

Demandant nonsuited.

THEOPHILUS CUSHING *versus* FRANCIS WYMAN, JR., ET AL.

An executory agreement with reference to the payment of a note, constitutes no bar to a suit upon the same.

A plea of accord can be sustained only by proving an accord not executory, but which ought to be and has been executed before the commencement of the action.

To enable a party to set up the defence of payment, there must be the concurring intention of the party making and the party receiving the payment. The payment must be received as well as made in satisfaction of the debt.

An agreement to transfer a note, to be credited on account of goods sold, when it should become payable according to its conditions, is neither payment or extinguishment of the note; and if at the maturity of the note there was due for the goods a sum exceeding the amount of the note, that would constitute no bar to a recovery upon the note, where, before that time it had been transferred for a full and adequate consideration, without notice.

Cushing *v.* Wyman.

Upon an account current, where there is no specific appropriation of payments, they must be applied to extinguish the first items of payment, although the creditor may hold security for those items, and none for the final balance of the account.

An agreement to abandon a claim without consideration shown, is a mere *nudum pactum*. Accord, without satisfaction, would be no answer; and if a substituted agreement be shown, it must appear that its performance was accepted in satisfaction.

Where there is no defence to a note transferred in payment of property sold and delivered, and where it may be enforced in the name of the payee, for the benefit of the holder; there exists no valid and sufficient reason for rescinding the contract of the sale.

REPORTED by APPLETON, J.

ASSUMPSIT upon an account annexed for

Two horses,	$250
Plaintiff's note,	$180,75
	$430,75
And interest from March 18, 1852,	$120,00
	$550,75

Also a count for money had and received.

The plaintiff introduced testimony tending to show that on December 2, 1851, one of the defendants called upon the plaintiff and bought the horses, at the sum of $250, for which they turned out a note against Walter Brown & Son and William H. McCrillis, on which a balance of $430,75 was then due, which note, he represented, was the amount due him by them, McCrillis and Browns, and that he supposed it would be paid when it was due. The plaintiff accordingly gave the defendants a bill of sale of the horses, and at the same time gave them his note for the balance, of $180,75, which was paid at maturity to the defendants, the bill of sale also containing a charge of the note.

The drafts mentioned in the Brown and McCrillis note were paid at their maturity, January 20, 1852, by the plaintiff, at or before which time he presented the note of Brown and McCrillis to Mr. Brown for payment, or to be allowed towards the drafts, when Brown refused to pay or allow it.

Thereupon the plaintiff commenced a suit against the defendants, by writ dated March 18, 1852, to recover the same claim as now sued.

That suit was prosecuted by the plaintiff, tried at the October term, 1853, of this court, on the second day of the term, and made law. At the trial of the case at that time, the plaintiff offered to surrender the Brown and McCrillis note to the defendants, and tendered the same to them, and they refused to accept it. The case was by order of court on law, "nonsuited," and is reported in 38 Maine R., 589.

After the said decision, viz.: on the 18th of March, 1856, the plaintiff's attorney gave up the note to one of the defendants, and then on the same day put this writ into the officer's hands for service, and it was served on that day. The writ had been already made and forwarded to Lincoln, from Bangor, to an attorney in Lincoln, with the note, with directions to give up the note, and then to have the writ served, which was accordingly done; the writ having been given to the officer for service, but not until after the note had been surrendered to the defendant.

The plaintiff then proved by Walter Brown, one of the signers of the note, that the note in question had been given for the balance due F. Wyman, Jr., one of the defendants, on a lumbering operation of the previous winter. That soon after the note was given, Wyman again applied to him to supply him for another operation for the then ensuing season; that he consented, upon an agreement between him (Wyman) and Brown & Son, that he should turn out the Brown and McCrillis note, to go toward the supplies; that he should not give credit for it, until it was payable; that in pursuance of that agreement, said Brown & Son did supply the defendants to the amount of two or three thousand dollars; that the amount of supplies furnished, all of which was due and unpaid on December 2, 1851, was $583,77

Amount due March 18, 1852, was $1406,50

" " October 5, 1853, was about $1700,00

" " at the present time, $302,67

That no sum had as yet ever been credited for or on account of this note, for the reason that it had never been surrendered or offered; and that no sum had ever been paid by the defendants towards the said account, except what had been received for lumber sold, the proceeds of said operation; that as security for these supplies, they had taken from Wyman an assignment of the permit under which they were cutting, and of all logs and lumber cut under it, and they had by virtue thereof, the marketing of the logs; that no settlement had ever been made between Brown & Son and the Wymans, and that, though often urged, the Wymans had never offered to settle with Brown & Son; that after the agreement with Francis Wyman, Jr., he took in his brother, Andrew W., the other defendant, and the two were in the place of Francis, who originally made the bargain; that the makers of the note against Brown & Son and McCrillis had ever been, and are still, solvent.

The T. Cushing drafts, named in the note, were given by the plaintiff for the logs cut by Wyman in the previous winter's operation, and sold by Brown & Son and McCrillis to Cushing: the note being given for the balance due Wyman of the proceeds.

When the note was given up to Wyman, on the day this action was commenced, he took it under the supposition of its being another paper, and on seeing what it was, offered to return it to the plaintiff's attorney, as having been unintentionally received.

Copy of Bill of Sale.

FRANKFORT, DEC. 2, 1851.

F. & A. W. Wyman.

Bought of T. Cushing,

One span black horses,	$250,00
Note payable January 17, 1852,	$180,75
	$430,75

Contra Cr.

By W. H. McCrillis and Walter Brown's Note, $430,75

Settled as above. E. E. T. CUSHING, per G. B. C.

Copy of Note.

$530,75. For value received we promise F. Wyman, Jr., to pay him five hundred and thirty dollars and seventy-five cents, provided the drafts given by T. Cushing, for the logs cut on No. 2, range 9, are paid.

WM. H. MCCRILLIS,
Sept. 29, 1851. WALTER BROWN & SON.

Indorsed. Received on within of W. H. McCrillis, one hundred dollars. F. & A. W. WYMAN.
Dec. 2, 1851.

A. W. Paine, counsel for the plaintiff.

The right of action was mature before the writ was issued, even though the note was not surrendered until after the writ was actually made. The writ was provisionally made, and not issued until after the right of action was complete. This is right. *Badger* v. *Phinney*, 15 Mass. R., 359; *Tufts* v. *Kidder*, 8 Pick. R., 537; *Seavie* v. *Lincoln*, 21 Pick. R., 267; *Swift* v. *Crocker*, 21 Pick. R., 242; *Haskell* v. *Brown*, 2 Fairf. R., 261.

But the question does not arise here, inasmuch as a tender of the note was made in court on October 5, 1853, and refused. This fact puts the objection out of the case.

Was the surrender of the note, or rather the rescision of the contract seasonable?

The facts are that the trade was made December 2, 1851; that the note matured January 20, 1852, and there is no proof that the badness of the note was known to the plaintiff before the maturity or about that time; that an action *based* on the rescision of the contract was commenced on March 18, 1852, and that on trial of that case on October 5, 1853, the note was surrendered or tendered to the defendants.

Now although the rescision should be made within a "reasonable time," yet in deciding upon the question of "*reasonableness*," the court will regard that time reasonable which will save the party from loss and reinstate him in the rights with which, by the trade, he parted. In other words, if the party

is placed in *statu quo* with reference to the transaction, not being harmed, the court will regard the act as reasonably done. The *tempus in quo* is but one of the ingredients of the matter; a more important question is, whether by the delay the party has suffered any injury.

And more especially will the court so act, when the party interested has been himself the guilty party in effecting the trade, as the defendants here are. The court will hold them to the strict rule.

Almost all the authorities concur in stating the principle alluded to, in the manner now contended for. *Conner* v. *Henderson*, 15 Mass. R., 321–2.

If he would rescind, &c., he must "put the defendant in the same situation as he was in before the delivery of the article." *Paley* v. *Balch*, 23 Pick. R., 286. "He must put the party in as good a situation as he was before." Chitty on Cont., 276.

"If the offer to reconvey the land would vest in the plaintiffs their original title, so that *substantiallg* they would be in the same situation as before the conveyance," &c. *Holbrook* v. *Bent*, 22 Pick. R., 554.

"He must do it in a reasonable time," to be sure, "and must reinstate the party in the condition he was in before the contract," &c. *Ayers* v. *Hewett*, 19 Maine R., 287.

The party cannot rescind, unless both parties can be put in *statu quo*. *Coolidge* v. *Bridgham*, 1 Met. R., 550.

Where one's own note was taken, it was held that it need not be returned at all. Why? Because it was of no value. The note here was invalid, and only good as a receipt, and if he gets it back in season for settlement, it is enough. Here $1700 was due, when tendered back.

In all the cases, the criterion seems to be this: whether the party (guilty party) can be placed in *statu quo* with reference to the transaction.

But here there was notice by suit as early as March 18, 1852, that the plaintiff did rescind the sale. This was sufficient. 2 Sandf., 421; 1 Sandf., 560.

All the facts in this case show that the defendants have not been in any way injured by not having the note surrendered at an earlier day, but that the tender did place them in *statu quo*, and hence was within reasonable time.

According to the agreement, the note was to be paid by supplies. The supplies were furnished. The note not being negotiable, was bound by the agreement. It was then after and on December 3, 1851, an entirely worthless paper, a *nudum pactum*, and good for nothing except as a voucher to be used in the settlement of the account between Brown & Son and defendants. For no other purpose was it worth a cent.

On December 2, 1851, when the plaintiffs took the note, there had been supplied more than the amount of the note, viz.: $583,77. On March 18, 1852, when notice was given, $1406,50; on October 5, 1853, when the note was tendered, $1700.

These figures prove conclusively, that for the purpose — the only purpose that the defendants could use the note, they were furnished with it in all good and seasonable time. No settlement has ever been made—none has ever been attempted between Brown & Son and the Wymans, and they desired none. They have paid nothing on account, by reason of not having the note. In no respect have they been injured, but by a return of the note as stated in the case, they are fully placed in *statu quo*. This is all that was required by the authorities.

Brown & Son and McCrillis, are still responsible, and no loss has been occasioned in this way, even though the agreement with Brown & Son had not existed as testified to by Brown.

A more important question, however, is, whether the agreement testified to by Brown does afford a defense to a suit on the note? or, in other words, was the note on December 2, 1851, such a contract as would support an action in F. Wyman, Jr.'s name against the makers?

The note was not negotiable; more correctly it was not a

note, but a simple contract, and as such, liable to be afterwards altered, discharged or controlled by subsequent agreement of the parties, even though by parol.

The agreement set up by Brown was made with Wyman while the legal holder of the paper, and the paper, when it passed from him passed with all the equities which existed between the parties at that time.

A new equity between one of the makers and the payee, had arisen by this verbal contract between Wyman and Brown & Son, that agreement attached to and really became in effect, a part of the contract, and bound it, so that in any action brought upon that contract in the name of F. Wyman, Jr., the matter might be legally given in defence.

If there could be any question about the validity of the defence while the agreement was executory, that question of doubt was removed upon the performance of it as it was performed by Brown & Son before the sale of the note to the plaintiff, for on December 2, 1851, $583,77 worth of goods had been supplied, being more than the amount of the note. From that time, a perfect defence to the note existed against Wyman, and of course against his assignee.

E. Kent, counsel for the defendants.

In the former case between these parties, 38 Maine R., 591, it was decided that "the note of McCrillis and Brown was of value to the defendants, as evidence of indebtedness on the part of the makers, and should have been returned, or an offer to return should have been made before suit."

In the case at bar it appears that, at the earliest, two years nearly elapsed before the offer to return at the trial of that case, and the second offer at the date of this writ, four years and one half after.

I make no question as to the fact that an offer was made before *this* suit was commenced, and I am willing to assume that it was made at the first trial, about two years after the contract for its sale.

This offer was not in a reasonable time. The law is well

settled, that when a party elects to rescind a contract for fraud or misrepresentation, he must restore the thing received by him, and put matters back exactly as they stood. This principle cannot be disputed. It is settled in the case between these parties, and has been decided in numerous cases. *Norton* v. *Young*, 3 Greenl. R., 30, and other cases; it is unnecessary to cite them.

This must be done in a reasonable time, and what is a reasonable time, is a question of law on the facts.

In *Norton* v. *Young* it was held that a return, after eleven months, of the confession note, was not in a reasonable time, and no one contended that it was.

In *Atwood* v. *Clark*, 2 Greenl. R., 249, the doctrine is fully established, that the law requires that where there is no express contract as to the time in which an act is to be done, it must be in a reasonable time.

The case of *Kingsley* v. *Wallace*, 14 Maine R., 57, held that *two months* was not a reasonable time, even where the party had expressly reserved a right to give up the trade.

The plaintiff then can only fall back upon an assumption that there is another condition, viz., that it must appear that the defendants suffered injury by such non-return, or that on the case no injury to them arose, by the delay.

In the first place, I deny the doctrine, and, secondly, I say injury did arise.

In *Conner* v. *Henderson*, 15 Mass. R., 319, it was held that where there was the least value, even nominal, as old lime casks, they must be returned.

In this same case, in 38 Maine R., this court says, this note of McCrillis and Brown was of value to the defendants, and should have been returned, and the law adds, in all such cases, "in a reasonable time." 2 Greenl. R., 254.

In the case at bar, the note was of full value, and is so now; and we wanted it, to have it passed to our credit on the books of Brown & Son.

The cases of *Ayers* v. *Hewitt*, 19 Maine R., 280, and *Thurston* v. *Blanchard*, 22 Pick. R., 18, were cases where the par-

ties' *own* notes were not returned. But they are carefully guarded, and apply only to the case of a party's own note, and that with hesitation, where the note was negotiable. In our court, the r cognition of *Thayer* v. *Blanchard* is quite doubting. But those cases expressly recognize the doctrine, that where other property or the notes of third persons are given, they must be returned.

The plaintiff then fails, because he did not return this note in a reasonable time.

Can the plaintiff maintain this action of *assumpsit* on this state of facts? If he has any cause of action, is it not trover or replevin for the goods delivered us? In this action he *affirms* the contract, sues for the price of his horses, and money had and received for the amount of his note, for $187, (or thereabouts,) which he paid. Is this *rescinding* the contract, or is it at best mixing up *affirmation* and *rescision* in one case? If he had an election in a given state of facts to rescind a bargain, or affirm it, and go for the guarantee or warranty, or damage for deceit; can he do both? The law gives him an election. He sues for the price of the horses—in fact, attached them in the first suit—affirms the sale of the horses. He should have brought trover or replevin. The bargain was the note for the horses. The bargain cannot be rescinded and in force both. He could have had trover also to recover his note. But he does not take that course. He goes for the price of his horses, and to recover back money paid on his note. He should have brought trover for his note, or defended against it. He cannot say that the note he received was not what it purported to be—was not good against the signers, and therefore was *no payment.* It was received in payment, and the court says, on this case, 38 Maine R., 591, that "the defendants were liable to the plaintiff, on an implied guarantee, that the amount purporting to be, was actually due." Then he should have sued on that guarantee, especially if he *affirms* the sale, as he does, in this case.

I submit that this action cannot be sustained.

He has in no event a right of action against us, because he should have collected the note of Brown & Son. He took their allegations to be true, which we deny. By dropping Brown & Son, and suing us, they made Brown a witness, which was of great importance, as the law then stood. In a suit on that note, Brown could not have been a witness. If he was in doubt, he could have called on us to assume the prosecution, and bring an action in the name of F. Wyman, Jr.

But waiving all other points, we say, that upon his own showing, the plaintiff has no case, because the agreement, as set forth by him, was *executory* and not *executed.*

It is clear law that all executory contracts may be rescinded by the parties to them. *Johnson* v. *Reed et al.*, 9 Mass. R., 84.

The question here is, whether an understanding or agreement to turn in at a future time a note in payment of supplies *thereafter* to be furnished, but not to be passed to the credit until a fact in doubt then, is settled, viz.: the payment of the note, is an *executory* or *executed* contract. Is it anything more than an agreement to pay the money, if paid on the note, to be passed to his credit? All in the future.

All depended upon the contingency whether the Cushing drafts were paid or not. If not paid, then Brown & Son were not to take the note. The whole bargain, as stated in the report, amounts to this only, (admitting it to be true.) If the note of Brown and McCrillis becomes payable by the fulfillment of its condition, viz., payment of Cushing drafts, in January, 1852, (when the case finds they were payable,) then, and not until then, Wyman is to turn out this note to Brown & Son, and they are to receive and credit it. Wyman was not bound to do it, and Brown & Son not bound to receive it, until this contingency happens. All is executory.

Now, as a *sale* of this note to Brown & Son, there are several fatal objections. A sale must be completed, or it is no *sale.* It may be an agreement to sell. Here there was no delivery, and none to be made until a contingency happens.

"Property does not pass absolutely, unless the sale be completed, and it is not completed until the happening of any event expressly provided for." Parsons on Con., vol. 1, p. 441, and cases there cited.

A delivery as against a subsequent purchaser is necessary to transfer property. Ib. *Houdlett* v. *Talman*, 14 Maine R., 400, and numerous other cases.

APPLETON, J. On the 29th of September, 1851, Messrs. Brown & Son and William H. McCrillis gave Francis Wyman, Jr., one of the defendants, a note of the following tenor:

$530,75. For value received, we promise F. Wyman, Jr., to pay him five hundred and thirty dollars and seventy-five cents, provided the drafts given by T. Cushing, for the logs cut on No. 2, range 9, are paid.

WM. H. MCCRILLIS.

Sept. 29, 1851. WALTER BROWN & SON.

On the 2d of December following, the above note was transferred, by the indorsement of the defendants, to the plaintiff, and in consideration therefor they received of him one span of black horses, valued at $250, and his note for the difference between their value and the note then transferred, which at its maturity was duly paid.

The notes of the plaintiff, Cushing, referred to in the note of McCrillis and Brown & Son, were paid by him at their maturity, on the 20th of January, 1852, *at or before* which time he presented their note, received from Wyman to Brown & Son, for payment, or to be allowed towards his drafts then maturing, which, for reasons disclosed in the testimony of Walter Brown, they declined doing.

Walter Brown, one of the firm of W. Brown & Son, testified that the note of September 29, 1851, had been given for the balance due F. Wyman, Jr., one of the defendants, on a lumbering operation of the previous winter; that soon after the note was given, Wyman again applied to him to supply him for another operation for the ensuing winter; that he

at first declined, but finally consented upon an agreement between him (Wyman) and Brown & Son, that he should *turn out the Brown and McCrillis note* (the whole of it) *to go towards supplies; that their firm should not, however, give credit for it until it was payable, according to its condition;* that in pursuance of such agreement, Brown & Son did supply the defendants with two or three thousand dollars; that the amount of supplies furnished and remaining due and unpaid December 2, 1851, was $583,77; that the amount due and unpaid March 18, 1852, was $1406,50; that the amount due and unpaid October 5, 1853, was about $1700; that the amount due and unpaid at the time of the trial, April, 1857, was $302,67; that *no sum had as yet been credited for or on account of this note,* for the reason that it had never been offered or surrendered to them; that no sum had ever been paid by the defendants toward this account, except what had been received from the lumber sold, being the proceeds of said operation; that as security for these supplies, they had taken an assignment of the permit under which they were cutting, and of all logs and lumber cut under it, and that they had, by virtue thereof, the logs to market; that *after the agreement with Francis Wyman, Jr.,* he took as partner his brother, Andrew W. Wyman, the other defendant, and the two were in the place of Francis, who originally made the bargain, that the goods were charged to the Wymans; that though often urged, they had never offered to settle with Brown & Son, and that the makers of the note, Brown & Son and McCrillis, were, and still are, solvent.

The plaintiff insists that these facts disclose a good defence to the note of Brown and McCrillis; that the note having been paid, was valueless at the date of its transfer; that this being the case, he had a right to rescind the contract; that having this right, he seasonably gave notice to the defendants of his intention so to do, and tendered to them the note in question, and demanded his property; and the same not having been surrendered on demand, that he can main-

tain the present action, which is assumpsit, for the price of the horses, and for the money by him paid.

Assuming the offer to rescind seasonably made, which is a matter of grave doubt, the inquiry arises whether this form of action can be maintained for the value of the horses, the title to which, if the rescision was valid, reverted to the plaintiff. In such case there is neither an express sale, nor any facts shown from which a promise can be implied. The defendants have made no new bargain, and the original one has been rescinded. If the contract was legally rescinded, the defendants, by refusing to restore the property, became wrong doers, not purchasers. The rescision must be entire, not partial.

But waiving all merely technical objections, the important question recurs, whether the facts disclosed in the testimony of Brown show any defence to the note of McCrillis and Brown & Son, and thus justify the plaintiff in his attempted rescision. If the note of September 29, 1851, transferred to the plaintiff, has not been paid, or there was or is no valid, subsisting defence to it, he can have no grounds upon which to rescind. The rights of the parties depend upon the testimony of Brown, and whether that shows a defence to the note.

The agreement between the parties, as stated in his testimony, was *purely executory*. Nothing is better established, by the entire concurrence of authorities, than that an executory agreement would constitute no bar to a suit upon a note. In *Cary* v. *Bancroft*, 14 Pick. R., 315, a negotiable note was made to the plaintiff by the defendant, who held a note made by the plaintiff, but not having it with him at the time, it was agreed that the two notes should be set off one against the other, so far as the smaller would pay the larger. It was there held that this agreement was executory, and therefore was not an extinguishment of the smaller note. In reference to this agreement to offset, so far as the smaller note would pay the larger, SHAW, C. J., said, that "if avail-

able at all, it was an executory contract, requiring some further act to be done before the one would operate as payment or extinguishment *pro tanto* of the other." In *Richardson* v. *Cooper*, 25 Maine R., 450, TENNEY, J., says, "in the case at bar, it was agreed by the parties and the witness, that an exchange of their several claims should be made, *which, if made*, would have been a discharge of the contract declared on; but this contract not being present at the time of the agreement, the exchange did not take place. Something further was to be done, to make this oral agreement effectual; it was executory; until executed, all former liabilities remained." "It appears," says TINDAL, C. J., in *Bagley* v. *Homan*, 32 E. C. L., 379, "by a long train of authorities, commencing with that of Dyer, 356, that a plea of accord, to be a good plea, must show an accord which is not executory at a future day, but which ought to be executed, and has been executed, before the action brought." In that case the court came to the conclusion that a plea of an accord executory, made upon mutual promises, was bad. In the case before us, no credit was to be given for the note until it should, after its maturity, have been turned out to the firm of Brown & Son, and by them passed to the credit of the Wymans, which was never done. 1 Ev. Pothier, 339; *Goodrich* v. *Stanley*, 24 Conn. R., 623.

The note in question was assigned to the plaintiff before its maturity, and on the 2d of December, 1851. At this time the defendants were indebted to the firm of Brown & Son, in the sum of $583,77, which exceeded the amount due on the note. Had the makers of the note, at that time, any right of set off, which would have been available by way of defence to a suit on the note; or had the same been transferred to or paid by the makers, or either of them; or was there any valid or subsisting agreement which would constitute a defence to the same?

The note was running to F. Wyman, Jr. The supplies were furnished by Walter Brown & Son, and were charged to F. & A. W. Wyman. A suit upon the note must have

been in the name of F. Wyman, Jr. In such suit it is apparent that the goods furnished could not have been successfully filed in set off, because the parties furnishing them were not the makers, and the parties to whom they were furnished were not the payees of the note.

The note having never been transferred by assignment or delivery to the makers or either of them, they could claim no title to it in either of those ways.

The note was not paid on the 2d of December, 1851, although goods to a larger amount had been furnished at that date. To enable a party to set up that defence, there must be the concurring intention of the party making and the party receiving the payment, to one and the same thing—that is, that there be a payment. "The effect of a payment," says Pothier, part 3, ch. 1, art. 14, s. 6, "is to *extinguish* the obligation and everything accessory to it, and to liberate all the debtors of it." But the note of McCrillis and Brown & Son was neither paid nor extinguished, nor intended to be. Brown testifies that their firm was to furnish supplies, but that they were not to give credit for the note until it was payable, according to its condition. If the drafts of Cushing, mentioned therein, should not be paid, the note was not to be transferred. The goods were charged and delivered to F. & A. W. Wyman, and they, as purchasers, were liable therefor. The note was not thereby paid, nor intended to be, nor were the goods delivered or received in payment thereof. No credit had then been given for the note, nor had it been transferred. The note then being in full force, was neither paid nor extinguished, but remained in full force, and under the legal control of Wyman. Whether Wyman would thereafter transfer it to Brown & Son was a matter resting simply in agreement, but which in no way affected the question of payment.

At the maturity of the note, there was due to Brown & Son, from F. & A. W. Wyman, an amount exceeding the note. But before that time it had been transferred to the plaintiff, for a full and adequate consideration, without no-

tice. Was there then or is there now any defence to a suit upon the note, in the name of the payee, and for the benefit of the plaintiff?

It has been seen that no payment was made before the maturity of the note, nor any valid agreement entered into by which the makers were discharged from liability. The goods previously delivered to F. & A. W. Wyman were not for the purpose of paying the note, and they were not received under the expectation that it was thereby paid. The risk and the ownership and the legal right of disposition of the note of Brown & Son and McCrillis, remained with Wyman, who would alone suffer in case of the insolvency of the makers.

After the maturity of the note, there is still less ground for the allegation of payment. The note had been transferred before maturity; and Brown & Son knowing of its assignment, could not defeat the rights of the assignee, if they had wished.

No specific goods were delivered or received at any time as in payment. The note, therefore, was not paid.

If any were delivered with that design, and received for that purpose, of all which there is no proof, the goods thus specifically delivered were those first in time. But the case finds that the whole amount of the large indebtedness of the Wymans has been discharged by the sales made by Brown & Son, of their lumber, excepting the sum of $302,67.

The law of appropriation of payments is well settled. The money received from the sales of the lumber of the Wymans must be appropriated to the discharge of the account of Brown & Son, in the order of its indebtedness. The goods first delivered would be first paid for, so that there would be no outstanding indebtedness, which upon any grounds can be applied to the payment of the note. It was held in *Trescott* v. *King*, 2 Selden, 147, that in case of a running account, where there is no specific appropriation of payments, they must be applied in general upon the first items of indebtedness, though the creditor may hold security for the

payment of those items, and none for the final balance of the account.

The note of the 29th of September, 1851, had two signers. The agreement set forth in the testimony of Brown was one by which one of the signers was to be the sole debtor, and to pay the debt, if it was anything. In *Lodge* v. *Dicas et al.*, 5 E. C. L., 397, there was an agreement that one of the partners should take upon himself to discharge a debt to A., and A., upon being informed thereof, agreed expressly to exonerate the other partner from all responsibility, yet it was held that this agreement was no defence to the latter, in a suit by him against both partners. "It is for the defendant, Dicas," says BAGLEY, J., "to show he was discharged. A release is one mode; another is satisfaction. It is clear that the former has not been given, and an agreement by the plaintiff to abandon a claim, unless there be a consideration shown, is a mere *nudum pactum*. Now what consideration is there in the present case." It was, however, held in *Thompson* v. *Percival*, 27 E. C. L., 241, that the acceptance of a bill of exchange by one of two debtors, given and received in satisfaction of the debt, would be a good discharge.

So the civil law has its novation by which a new is substituted for an old debt, which latter is extinguished by the new one contracted in its stead. "The effect of a novation is, that the former debt is extinguished in the same manner as it would be by a real payment. Where *one* of several debtors in *solido* alone contracts a new engagement with the creditor, as a novation of the former debt, the first debt being extinguished by the novation, in the same manner as it would have been by a real payment, all his co-debtors are equally liberated with himself. And as the extinction of a principal obligation induces that of all accessory obligations, the novation of the principal debt extinguishes all accessory obligations, such as those of sureties." 1 Ev. Poth., part 3, ch. 2, art. 5.

But no agreement is proved, which, upon the principles

of the cases to which reference has been made, or which, according to the doctrines upon which novation rests, would be a bar to the note. It is not in proof that McCrillis was to be discharged, or that Brown & Son were to be the sole debtors to Wyman, and to pay this note unconditionally.

Neither could a defence to the note be established on the ground of accord and satisfaction. Accord, without satisfaction, would be no answer. *Caxen* v. *Chadley*, 10 E. C. L., 270. If a substituted agreement be shown, it must appear that its performance was accepted in satisfaction. *Flockton* v. *Hall*, 71 E. C. L., 1039. The payments must be received, as well as made, in satisfaction of the debt, to show accord and satisfaction. *Webb* v. *Weatherby*, 27 E. C. L., 474.

Now in the case before us there are no specific payments which at any time appear to have been made or received in satisfaction of the note due Wyman, or which would sustain the plea of accord and satisfaction.

As the testimony of Brown discloses no defence to the note of McCrillis and Brown & Son, and as, for aught that appears, it may be enforced by Cushing in the name of Wyman, but for his benefit, there exists no valid and sufficient reason for rescinding the contract sought in this action to be rescinded.

The plaintiff failing to show any cause of action, must submit to a nonsuit.

Plaintiff nonsuit.

AUGUSTUS GOWEN *versus* PENOBSCOT RAILROAD COMPANY.

No action can be maintained against a railroad corporation for injuries by acts done in conformity to law, unless the corporation have in some way forfeited their chartered rights or the charter remedy has been rightfully modified by some statute, so as to authorize such suit.

The legislature having limited its power over a corporation to the imposition of any other or further duties, liabilities or obligations than those contained in their charter, is not restricted in any enactment as to the mode, the time when, and the courts where they shall be enforced.

The facts in this case are agreed by the parties. The writ is dated March 1, 1856.

The action is TRESPASS against said Company, for damage to the plantiff's land, in locating their railroad over it.

The title of the plaintiff is admitted, and that he is entitled to damage, if duly and seasonably applied for.

The charter and due organization of the company are also admitted, and that the company had the right to take the land, conditionally. Said right of way was taken, and the road duly located, and the location filed in December, 1852, but the track has not been laid, nor any work actually done upon the plaintiff's land; neither have the company done any other act or exercised any other control or ownership of said land, than to locate their said road over it, and make due record thereof, and that otherwise than said location and filing of said location of said right of way, the plaintiff has continued in the undisturbed possession of his premises.

It is also admitted that the parties could not agree upon the amount of damage, the plaintiff always claiming more than the company would consent to allow, and that neither party have petitioned to have the damage assessed.

The defendants also plead, that all rights to damage are barred by limitation.

J. A. Peters, counsel for the plaintiff.

By the statutes of 1847, our remedy by a petition is gone by limitation. Also by R. S., ch. 81, s. 4.

There being then no statute or charter remedy, the common law remedy of trespass revives. But it is expressly revived by a subsequent act. See Laws of 1853, ch. 41, s. 5.

The constitutionality of such a statute cannot now be doubted. It merely revives a remedy, and courts have gone the full length in not only reviving but absolutely creating them. *Colby* v. *Dennis*, 36 Maine R., 1.

It may be said that in this action of trespass, we can recover no damages till acts of occupation have been committed upon the land. To this we answer, that some damages, if but nominal, are recoverable.

But we claim more. Taking the context—the subject matter—the reason of the remedy, and we contend it is a mere renewal or continuance, in another form, of the substance of a remedy lost by limitation. That is, that this statute action of trespass is designed to have a plaintiff recover at once, in this suit, the value of the easement which the defendants took by their act of location, which the law names in this view an act of trespass. Otherwise, if one action must do, we may have to commence a great many more, as the defendants may be years upon our land, and that would be oppressive all around. Such a construction of the statute would perhaps require us to wait for compensation longer than would be just.

A construction such as the plaintiff contends for, would be practicable, and as a precedent, would let all parties easily ascertain and enjoy their rights respectively.

Rowe and *Wilson*, counsel for the defendants.

The question presented by the case is this, has the railroad company the right to use and occupy the plaintiff's land? On the decision of which depends the solution of this other question, shall the work go on, or be stopped?

A judgment for the plaintiff would be a perpetual bar to the defendants' entry on the land; for the time for taking, under the charter, is long passed.

If the act of 1853 operates here, the company, by force of

s. 5, have forfeited all right to the land, by failure to institute proceedings before the commissioners; have become trespassers or disseizors, at the election of the plaintiff, and the plaintiff has the right to have his damages, and, by s. 11, a perpetual injunction against the road, for the company having no right to the land, payment of damages cannot operate as a removal of an injunction.

The defendants were guilty of no illegal act in taking the land; by such taking, under their charter, they acquired an indefeasible right to use and occupy it, and thereby rendered themselves liable to pay to the plaintiff such sum as might be agreed upon, or in failure of the parties to agree, such sum as might be awarded on an application to the county commissioners, made within three years after the taking. That was the extent of their liability. Such a taking made, virtually, a contract between the parties.

The charter is a contract between the state and the defendants, that they should have the land on certain terms. The state cannot pass an act to impair the obligation of that contract, by changing the terms of payment, after the defendants have taken the land. It reserved no such right. Still less has it the right to declare the defendants' interest in the land forfeited, when they have always been ready to comply with those terms.

Under general railroad law we had a vested title, which a subsequent act cannot take from us.

The damages in this, and all similar cases, whether assessed by a jury or a court of equity, being awarded as satisfaction for a tort, and not as compensation for right of way, must be limited to actual damages prior to suit; in this case, to the treading down the grass, &c., by the surveying and locating party.

MAY, J. This is an action for trespass, alleged to have been committed by the defendants upon the plaintiff's land, in locating their railroad over it. The title of the plaintiff to the land, and that he is entitled to damages, if duly and

seasonably applied for, are admitted. It is also admitted that said right of way was taken, and the road duly located, and the location filed in December, 1852; since which time the defendants have exercised no control or ownership over said land, and the plaintiff has continued in the undisturbed possession of his premises.

It is insisted in defence, that more than three years having elapsed, after the taking of the land by said location, and no application having been made to the county commissioners to ascertain and determine the damages, in accordance with the provisions of the defendants' charter, s. 1, the plaintiff is without remedy, and that this action is barred by the provisions of such charter.

The right of the defendants, under their charter, which was granted August 2, 1847, to locate said road, and take said lands, subject to and upon the conditions therein contained, is conceded. After granting the power to take the lands, estate and materials necessary for the location and construction of said road, it is provided by said charter, s. 1, "that said corporation shall pay for said lands, estate or materials so taken and used, such price as they and the owners thereof may mutually agree on, and in case said parties shall not otherwise agree, then said corporation shall pay such damages as shall be ascertained and determined by the county commissioners, for the county where such land or other property may be situated, in the same manner and under the same conditions and limitations as are by law provided in the case of damages by the laying out of highways; and no application to said commissioners shall be sustained, unless made within three years from the time of taking such land or other property." The acts of the defendants having been done by authority of law, as found in their charter, which has prescribed a specific remedy for the damages sustained thereby, to which the authorities fully show the plaintiff must be confined, no action at law can be maintained for such injury, unless the defendants have in some way forfeited their chartered rights, according to the principles stated

in the case of *Cushman* v. *Smith*, 32 Maine R., 247; or unless the charter remedy has been rightfully so modified by some statute so as to authorize such suit.

It is contended on the part of the plaintiff, that the remedy prescribed by the charter has been so modified by the statute of 1853, ch. 41, s. 5. By this section it is provided that "no person who has suffered damages by the location of any railroad, and is entitled to compensation therefor, or who may hereafter suffer damages by any such location, and shall be entitled to such compensation, shall be barred of his claim, nor shall any rights whatever be acquired against him, if no proceedings shall have been or shall be instituted under the provisions of ch. 81 of the Revised Statutes, to ascertain and determine such damages within the time specified in the fourth section of said chapter, or as is hereinafter provided; but such person shall be entitled to his suit at law, as in case of trespass or disseizin." The facts argued in this case are within the express language of this statute. He had suffered nominal damages at least by the location of the defendants' road, and was entitled to compensation therefor; and the case finds that no proceedings have been had, to ascertain and determine his damages within the time specified in the R. S., ch. 81, s. 4, nor within the further time allowed in certain cases by the statute of 1853, s. 12. The time specified for the institution of such proceedings by the fourth section of said chapter 81, is found to be in exact conformity with the time specified in the defendants' charter, s. 1, before cited; and, by the third section of the same chapter, the same mode of estimating and ascertaining the damages for lands taken for the use of any railroad corporation, is provided as in said charter, and the conditions and limitations established by both are precisely the same. It is further provided by said charter, s. 1, "that said corporation shall have all the powers, privileges and immunities, and be subject to all the duties and liabilities provided and prescribed respecting railroads, in ch. 81 of the Revised Statutes, not inconsistent with the express provisions of this charter." It

therefore appears that the provisions of the charter and said chapter are identically the same upon the subject of damages, and that by these, both parties had the privilege of instituting proceedings within the time limited by ch. 81, s. 4, to ascertain and fix the damages which the plaintiff had sustained, by the taking of his land, but neither chose to exercise such privilege.

That it was competent for the legislative power to authorize the taking of the plaintiff's lands for railroad purposes, by providing such remedy for compensation, subsequently to be made, is settled in the case of *Cushman* v. *Smith*, before cited; and in the judgment of the court, all the provisions before referred to relate to such remedy.

While it was the intention of the legislature to make the rights which were vested in or acquired by the defendants irrevocable, by providing in their charter, s. 17, that it should "not be revoked, annulled, altered, limited or restrained, without the consent of the corporation, except by due process of law;" and while the legislative power was so limited as to prevent any subsequent imposition upon the defendants, "of any other or further duties, liabilities or obligations," we are fully satisfied that the legislature not only reserved the right, at all times, to inquire into the doings of the corporation, and the manner in which the privileges and franchises conferred may have been used and employed; but to pass any laws which might be deemed more effectual to secure the rights of the corporation on the one hand, or to compel a performance of their duties and liabilities on the other. The remedy for the security of their rights, and to compel a performance of their liabilities, *as to the mode, the time when, and the courts where they should be enforced*, was not in any way placed beyond legislative control, and these, we should suppose, should be alike in substance for all persons and corporations in the same circumstances.

When the defendants took the plaintiff's land, they were laid under a legal obligation to make suitable compensation therefor, and when the legislature authorized the taking, it

became their duty to prescribe some suitable remedy to compel the payment of such compensation; and if, in their judgment, the remedy adopted at the time was unsuitable and insufficient, they had the power in this case, as in most if not all others, to change it. The defendants, by such alteration, were not deprived of the right or the power to have the damages determined in this case in the mode first provided.

By the statute of 1853, before cited, the legislature have thought proper, in cases where neither party have resorted to the particular remedy provided at the time of the charter for a performance of the obligation to make compensation, to allow the owner of the land, which had been taken, a further time and a different mode in which to compel such performance. The motive for such enactment may be the hope that a subsequent liability to an action at law, would be likely to induce such corporations to a more speedy and certain performance of their constitutional obligations, by resorting to the mode provided, before the time of limitation should expire. This statute does not in any manner touch any of the vested legal rights, or add to the legal obligations and liabilities of the defendants, and therefore is not in conflict with any of the provisions of their charter. The defendants are to be defaulted, but as the parties have agreed to submit the qu stion as to the amount of damages, to an intelligent referee, we refrain from making any intimations on that subject.

Defendants defaulted.

ADONIJAH WEBBER *versus* WENTWORTH DAVIS ET AL.

A sale without delivery is valid as against the vender, and the title will pass from the true owner, though the goods at the time of sale, are tortiously possessed by a third party.

Where one wrongfully disposes of, or inteferes with, the goods of another, it will constitute a conversion without a manual taking or removal.

REPORTED by APPLETON, J.

TROVER for the value of a mare.

The facts of the case appear in the opinion of the court.

D. D. Stewart, counsel for the plaintiff.

The plaintiff bought the mare of one of the defendants, and paid for her. The contract was a fair one, and such as the parties had the right to make. The *risk*, which the plaintiff must necessarily incur, of losing the money paid for the mare, was a fair set off against the deduction made by the defendant from her value. The defendant had searched for her, but could not find her. She had been stolen from him, and the chances were strong that he should never recover her. Under these circumstances he chose to take one third of her value in money. He thus saved himself from any further trouble and expense in endeavoring to find her, and from the risk of a total loss of the mare.

By the agreement, the property in the mare passed to the plaintiff. In *Courtland* v. *Morrison*, 32 Maine R., 190, the court hold that "The title will pass by a sale, without delivery from the true owner, though at the time of the sale the goods are in the tortious possession of a third person." The same doctrine is held in *Parsons* v. *Dickinson*, 11 Pick. R., 354; *Laufear* v. *Sumner*, 17 Mass. R., 113.

And a sale without delivery is always good as against the vendor. Same authorities. *Ludwig* v. *Fuller*, 17 Maine R., 162.

The testimony of Ephraim Jones shows that in June, 1852, Wentworth Davis, the same defendant, who had previously

sold the mare to the plaintiff, claimed her as his property, and offered to sell her to the witness, and threatened to send his son and take the mare away from the witness, if he did not buy her.

This was an unlawful assumption of control and dominion over her, in defiance of the right of the plaintiff.

The witness further testifies that John Davis, the other defendant, came to his house, in October, 1853; claimed the mare as agent for his father, Wentworth Davis; proposed to sell her, as such agent, and did sell her on October 24, 1853, to the witness, for the agreed sum of $60,00, and gave the witness an indemnity in writing against the title of the plaintiff.

This indemnity bears date October 24, 1853, and was given and signed by both defendants.

Here is abundant proof that both defendants exercised dominion over the mare, *in defiance* and *in exclusion* of the rights of the plaintiff. The sale was made by John Davis, acting as the agent of Wentworth Davis, October 24, 1853. It makes no difference that the money was not paid over until the spring following. The claim on the part of the defendants to the mare, and their assumption of the right to sell her, in defiance of the plaintiff, and the actual sale of her, took place on October 24, 1853. The written indemnity bearing that date, shows on its face a completed conversion of the property, and the defendants are estopped by it to deny any of the facts it recites.

If it is said in defence, that the case does not show that the defendants took *manual possession* of the mare, and therefore a *conversion* is not made out, the answer is, that such proof is not necessary.

In *Gibbs* v. *Chase*, 10 Mass. R., 128, the court say, "No actual force is necessary to be proved. He who interferes with my goods, and without my consent, undertakes to dispose of them as having the property, does it at his peril, to answer me the value in trespass or trover." In *Miller* v. *Baker*, 1 Met. R., 31, the court quote the foregoing sentence

approvingly, and add: "It is sufficient to maintain trespass, if the party exercises an authority over the goods, against the will and to the exclusion of the owner, by an unlawful intermeddling, though there be no manual taking or removal."

In *Bowlin* v. *Nash*, 10 Cush. R., 418, the court, quoting from Lord Holt's definition of conversion, hold that if the defendant "assumed upon himself the property and right of disposing of the plaintiff's goods," it is a conversion.

In *Fernald* v. *Chase*, 37 Maine R., 270, SHEPLEY, C. J., says, "It is not always necessary to prove that the defendant has had the actual possession of the property. The exercise of such a claim of right, or of dominion over it, as assumes that he is entitled to the possession, or to deprive the other party of it, is a conversion."

This suit was brought December 17, 1853, after the sale of the property by the defendants, October 24, previous, and according to these authorities, the action is maintainable.

S. H. Blake, counsel for the defendants.

1. I submit that the plaintiff had no title to the mare; first, because he never had any delivery; second, because he knew the mare was stolen in "February or March, 1852." Within a "week or two" the plaintiff is at Lunenburg, and sees her, and thus *knows where* the mare was then. A "month" after she was stolen he pays the $20,00 to Davis, having previously seen the mare at Lunenburg, knowing she had been stolen, and yet does not communicate this knowledge, when he undertakes to buy.

If Webber had no complicity with the stealing, he had that knowledge about it that would render his purchase of property, known by him to have been stolen, void.

2. There has been no conversion by either defendant. No demand and refusal, from which to infer a conversion, and if there had been, it would be of no avail, as the mare was out of the reach and jurisdiction of the defendants.

The mare is *now* and *always* has been, since April, 1852,

on the farm of Jones, at Lunenburg, Mass. They have not taken *possession* of her, nor *interfered* to prevent Webber from taking possession of her at any time.

If the mare became Webber's by the paying the $20,00, under the circumstances, she is now Webber's, and he can now go and take her where he first found her, for she remains there, and Jones has no title to her, for the defendant had none to pass to him; and when Webber demands the mare of Jones, he may turn her out to him, or refuse, and thus be guilty of a conversion himself.

If the mare did not become Webber's, then he cannot, of course, maintain this action in *trover*.

Upon the point of conversion, several authorities may be cited by the plaintiff's attorney, for instance: 7 John. R., 254; 10 John. R., 172; *Murray* v. *Bailey*, *Shipwick* v. *Blanchard*, 67, 12, 298; *Reynolds* v. *Shater*, 5 Conea, 324. I think these are the strongest cases we can find.

But in all these, though no removal of the property in some of them, there was an assertion of title, with a threat to maintain it, the *thing being* present, and the *power* to maintain it at hand.

One was a distress for rent, a seizure of the goods by an officer, notice of claim, and a legal holding of the possession, until five months' rent and forty dollars' costs were paid.

Another, a seizure of the goods, and two soldiers placed over them, though no removal.

But in *Fernald* v. *Chase*, 37 Maine R., 289, as exhausting the subject estating the true doctrine. Also, *Bubier* v. *Bubier*, 39 Maine R., 307; see 8 Vt. R., 33 and 110, and *Reysdale* v. *Williams*, 8 Met. R., 498; *Glover* v. *Reddich*, 11 Met. R., 582.

3. There is no pretence of conversion by John Davis, the son, that I am aware of.

4. And the only real pretence of a conversion by W. Davis, was *when* the bond was *executed*, and became a *bond* by delivery, and the $60,00 was paid. But *that* was "in the spring or summer of 1854," which was *after* the date of the

writ. So the action fails, if rested on this ground. *Storm* v. *Livingston*, 6 John. R., 44.

GOODENOW, J. This is an action of trover, to recover the value of a mare which Wentworth Davis, one of the defendants, formerly owned, and which, it is supposed, was stolen from him in February or March, 1852. The writ is dated December 17, 1853. Davis made search for the mare, after she was stolen, but could not find her. About one month after she was stolen, the plaintiff and the said Wentworth Davis met, and the plaintiff offered him $20,00 for the mare, and to run his own risk as to finding her. By the proposition, if the plaintiff found the mare she was to be his property, if not, he lost the $20,00, and had no claim on Davis to recover it back. The mare was worth $60,00. The proposition was accepted, and the plaintiff paid said W. Davis the $20,00.

Within two or three weeks afterwards the plaintiff found said mare in the possession of one Ephraim Jones, in Massachusetts. Before he could succeed in getting her from Jones, the said W. Davis claimed her as his, but he did not before the commencement of this suit, offer to rescind the contract with the plaintiff, or pay back the $20,00.

The deposition of said Ephraim Jones makes a part of the case.

The title will pass by a sale without delivery from the true owner, though at the time of the sale the goods are in the tortious possession of a third person. *Courtland* v. *Morrison*, 32 Maine R., 190. And a sale without delivery is valid as against the vendor.

By the admitted facts in the case, we are of opinion that the property of the mare was in the plaintiff, at the time he found her in the possession of the said Ephraim Jones.

Has there since that time, and before the commencement of this action, been a *conversion* of the same by the defendants, or either of them? A demand and refusal are only evidence of a conversion. When there has been an actual con-

version, and it can be proved, no demand is necessary before commencing a suit. It is not every interference with the property of another which constitutes a conversion. One person may remove the property of another person from one place to another place, without being guilty of a conversion of it to his own use. He may do it, without asserting any claim to it, for the benefit of the owner, and admitting his title to it.

But if one person interferes with the goods of another, and without his consent undertakes to dispose of them as having the property, he does it at his peril; and there need be no manual taking or removal in order to constitute a conversion. It is sufficient if he exercises an authority over the goods against the will and to the exclusion of the owner, by an unlawful intermeddling with them, or assumes upon himself the property and right of disposing of them. This is abundantly established by the authorities cited by the counsel for the plaintiff. *Gibbs* v. *Chase*, 10 Mass. R., 128; *Miller* v. *Baker*, 1 Met. R., 31; *Bowlin* v. *Nash*, 10 Cush. R., 418; *Fernald* v. *Chase*, 37 Maine R., 290.

By the deposition of Jones, it appears that John Davis, as the agent of his father, did sell the mare in question to said Jones, for the sum of $60,00, on the 24th of October, 1853, which was before this action was commenced. And it is fairly to be inferred that he signed the obligation at that time, which is annexed to said deposition. The obligation speaks of the mare as having been "supposed to have been stolen from *us* about the winter of 1851–2." It admits that they both received the $60,00, paid by Jones for the mare, and both promised to indemnify Jones against the claim of any other person on said mare. Jones says the obligation was procured by him, and was handed to John Davis, when he was at the house of the witness, in October, 1853, to take down to his father, to be signed by him. and to be brought back in the spring or summer of 1854, when he paid for the mare; and it was taken by John, because the witness wanted Wentworth Davis' name to the instrument. But whether

signed by John Davis at that time or subsequently, it is proved to have been in his hands in October, 1853; it is to be presumed that he then knew the contents of it; and it is evidence of what he then undertook to do in relation to the property in said mare, although it might have been signed by him subsequently, and at the same time it was signed by his father.

We find no foundation in the facts reported in the case, for the argument of the defendant's counsel, that the sale of the mare from W. Davis to the plaintiff was fraudulent and void, on account of a fraudulent suppression of facts known to the plaintiff and not known to W. Davis. The case states as a fact, that after said sale was made, and the $20,00 paid by the plaintiff to said W. Davis, "within two or three weeks afterwards the plaintiff *found the mare* in the possession of one Ephraim Jones, in Massachusetts." There is no evidence that the plaintiff had any knowledge that the mare could be found at that place or any other, when he purchased the mare of W. Davis.

By agreement of the parties, the case having been submitted to the court upon the facts and evidence reported, with authority to draw such inferences as a jury might, and to enter judgment according to the law of the case, we have arrived at the conclusion that the defendants must be defaulted, and judgment entered for the plaintiff, for the sum of $60,00 damages, and interest on the same from the date of the writ, with costs.

JOHN J. PILLSBURY ET ALS. *versus* JOSEPH M. MOORE ET ALS.

Riparian proprietors have a right to the flow of the water in its natural current, without any obstructions injurious to them.

A party acquires a right to the use of water in a particular manner by an uninterrupted, adverse enjoyment of such use over twenty years; but an omission by the owner to make use of his right, does not impair his title or confer any right thereto upon another.

It is not the *non user* by the owner, but the adverse enjoyment by another, which destroys this right.

A tenant in common may maintain an action against his co-tenant for diverting the water from their common mill for separate use.

An action may be maintained as well for continuing a nuisance erected by another, as for the original erection.

A purchaser of property on which a nuisance is erected, is not liable for its continuance unless he has been requested to remove it.

ACTION ON THE CASE, for the continuance of a dam, whereby the plaintiffs' ancient mill site was flowed and destroyed.

REPORTED by APPLETON, J.

The facts necessary to a full understanding of the case, appear in the opinion of the court.

G. W. Whitney and *D. D. Stewart*, counsel for the plaintiffs.

Rowe & Bartlett, counsel for the defendants.

APPLETON, J. The ancestor of the plaintiff was the part owner of a mill and privilege, which has been flowed out by a dam erected by those under whom the defendants derive their title. This action is brought for damage sustained by the continuance of the dam thus built, in consequence of back water caused thereby.

At the time when the dam in question was erected, the ancestor of the plaintiff had acquired no prescriptive rights by reason of a continued occupation for over twenty years. The defendants and those under whom they claim since its erection, have acquired no rights by lapse of time to have

and maintain their dam at its present height. The respective rights of the parties remain as at common law, unaffected by any question of prescription.

As riparian proprietors, the plaintiffs have a right to the flow of the water in its natural current, without any obstructions injurious to them. "No man, says STORY in *Wilkinson* v. *Tyler*, 4 Mass. R., 400, has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above." In *Cowles* v. *Kidder*, 4 Foster's R., 365, it was held that every proprietor of land over or through which a stream of water flows is, in virtue of such ownership, entitled to the use of the water flowing over it in its natural current without diminution or obstruction; and no proprietor below has any right to throw back water upon a proprietor above. *Mason* v. *Hill*, 5 B. & A., 1; *Heath* v. *Williams*, 25 Maine R., 209; *Hatch* v. *Dwight*, 17 Mass. R., 289.

A party acquires a right to the use of water in a particular manner by an uninterrupted, adverse enjoyment of such use over twenty years. But an omission by the owner to make use of his right, does not impair his title or confer any right thereto upon another. It is not the *non user* by the owner, but the adverse enjoyment by another which destroys his right. *Townsend* v. *McDonald*, 2 Kernan, 381. Mere non user for less than twenty years will not prove an abandonment of a mill privilege or right of way. *Williams* v. *Nelson*, 23 Pick. R., 141; *French* v. *Braintree Manufacturing Company*, 23 Pick. R., 216; *Hurd* v. *Corliss*, 7 Met. R., 94. The evidence fails to prove an intentional abandonment of the privilege by the plaintiff's ancestor. He might have been willing to sell his interest in the privilege, but a sale of a privilege for its value or an offer to sell, is not to be regarded as an abandonment.

It was held in *Odiorne* v. *Lyford*, 9 N. H. R., 502, that if one co-tenant of land upon which a mill is situated, erects a dam below on the same stream, on his private estate, and thereby flows the common property to the injury of his co-

tenant, the latter may maintain an action of the case against him. In *Blanchard* v. *Baker*, 8 Greenl. R., 253, the court held that one tenant in common might maintain case against his co-tenant for diverting the water from their common mill, for separate purposes.

It would seem therefore that Edmund Pillsbury, in his life time, might well have maintained an action for the injury to his privilege caused by the dam erected by those from whom the defendants claimed title.

It is well settled that an action may be maintained as well for continuing a nuisance erected by another, as for the original erection. *Staple* v. *Spring*, 10 Mass. R., 72.

This action is not against those by whom the dam was erected, by which the mill privilege of the plaintiff's ancestor was flowed out. It is not for an original and wrongful erection, but for its continuance by those who derive title through various mesne conveyances from those by whom it was erected.

If this action is not brought against the original erecter of the nuisance, but against feoffee, lesee, &c., it is necessary to prove a special request to the defendant to remove the nuisance. 12 Peters' R., 799. In *Woodman* v. *Tufts*, 9 N. H. R., 88, it was held that when a dam was erected and land flowed by the grantor of an individual, the grantee will not be liable for damages in continuing the dam and flowing the land as before, except on notice of damage, and request to remove the nuisance or withdraw the water. "It may be considered as settled," says UPHAM, J., "that when he who erects a nuisance conveys the land, he does not transfer the liability for the erection to the grantee, for the grantee is not liable till upon request, he refuses to remove the nuisance, for the reason that he cannot know until such request, but the dam was rightfully erected." In *Johnson* v. *Lewis*, 13 Conn. R., 307, SHERMAN, J., says, "the law is well settled that a purchaser of property on which a nuisance is erected is not liable for its continuance unless he has been requested to remove. This rule is very reasonable. The purchaser of

property might be subjected to very great injustice, if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot be easily known except to the party injured. A plaintiff ought not to rest in silence, and presently surprise an unsuspecting purchaser by an action for damage; but should be presumed to acquiesce until he requests a removal of the nuisance." Angel on Water Courses, 403. *Plummer* v. *Harper*, 3 N. H. R., 88. Gale & Whateley on Easements, 404.

The defendants are not those who are responsible for the erection of the original nuisance—for as between the parties owning the dams when the lower one was built, that must be regarded as a nuisance to the upper—but have subsequently acquired their title. They have never been requested to remove their dam. Until that is done, and they have neglected to comply with such request, they cannot be regarded as in fault.

Plaintiffs nonsuit.

THOMAS GRAGG *versus* WILLIAM W. BROWN.

At common law, the relation of consignor and factor, with advances from the latter to the former, creates a lien on the goods consigned.

If one having a lien upon goods for advances made by himself, consents to a sale to a purchaser from the owner of the goods, or conceals from the purchaser his claim on the property, he will be estopped to deny the title so acquired.

The action is TRESPASS for the value of a lot of timber upon which the plaintiff claims a lien for advances and commissions, to J. B. Foss, of whom he received the timber.

The verdict was for the plaintiff, and the evidence is reported by APPLETON, J., on a motion for a new trial.

The defendant claims to have purchased the timber of the

owner with the knowledge and consent of the plaintiff. The plaintiff introduced the following receipt:

BANGOR, March 19, 1856.

Received of Thomas Gragg, his note, dated December 21, 1855, on six months, for four hundred and eighty-seven dollars; also his note for five hundred and thirteen dollars, dated January 21, 1856, payable in six months, which notes I agree to pay at maturity, if said Gragg does not sell lumber enough to pay the notes, and said Gragg is to have a commision for selling the lumber.

Signed, J. B. FOSS.

Rowe & Bartlett, counsel for the defendant.

The claim set up by the plaintiff is a lien claim for security. Foss had no power to pledge the lumber to the plaintiff. His possession and power were those of a factor. The permit was assigned to him, and the lumber put in his possession as security for advances, with authority to sell. The doctrine that a factor cannot pledge, is settled beyond controversy. 2 Kent's Com., 625–9, and note, and authorities. *Van Amringe* v. *Peabody*, 1 Mason's R., 440; *Kinder* v. *Shaw*, 2 Mass. R., 398; 15 Mass. R., 396; 5 Pick. R., 7; 13 Mass. R., 178.

R. S., ch. 43, limits the rights which it gives factors to pledge, to merchandise shipped.

It will not be contended that Foss could pledge, to any extent beyond his own lien; that he could do any more than transfer the property, with a right to hold it until his own lien claim was paid.

The plaintiff was a dock-keeper. His dock was open for the reception of the lumber of any one who would run it there, and pay the dockage. Three fourths of the lumber which was from time to time deposited in his dock, he had no concern with, except as dock-keeper. With the other one quarter, a portion he bought and sold, and a portion he had authority to sell as agent. Foss had deposited his lumber there, for years, and had given the plaintiff authority to

sell, as he could, as his agent. The defendant had also deposited his lumber there for years, without giving the plaintiff any such authority. The plaintiff's possession, then, was *prima facie* that of a dock-master, and was not evidence to third persons, of ownership, or of a lien. Though it might be good as against Foss, to uphold the lien, it was not valid against a third party ignorant of the lien claim. It cannot be set up against a purchaser from Foss, without notice, and for value.

Foss had a right to sell. He sold very much the larger portion of this lumber, with the knowledge of Gragg; and Gragg allowed the purchasers to take it. One of said sales and delivery was to this defendant, about the same time. There was no refusal on Gragg's part to deliver—no denial of the right to sell until after he had discovered that Foss had failed. He knew when the first sale was made by Foss to Brown, and did not notify him of any claim.

Foss had authority to sell this lumber, and Gragg had not. Foss had been appointed agent of the owners to sell it; that power to sell he could not transfer. Long on Sales, 390; 2 M. & S., 299, 301; 6 Taunt., 147.

The right to sell remained in Foss alone, and his bill of sale passed the owner's title.

John A. Peters, counsel for the plaintiff.

This was a case for a jury to say whether they believed one side or the other, and the jury have decided it. That is conclusive.

When the plaintiff received the lumber, the lien attached by the agreement. As the receipt is in short and incomplete terms, it became necessary to show by parol, enough to make it apply.

There was a lien in the plaintiff *by* the contract, and there was one *without* it by law. Bouvier's Law Dictionary, titles lien, factor, &c., &c.

The defendant and plaintiff both claim under Foss. The defendant's bill of sale was from Foss, as his own lumber.

Foss had the control and possession, and sale of the lumber, from the parties of whom he received it, *as his own.*

He had assigned a permit to Hayford & Taylor, as collateral, but they have been paid, and have in no stage of this controversy, interfered. Both claim, therefore, under Foss.

The defendant says the plaintiff knew when he bought; the plaintiff said he did not know for two weeks, or a week after the sales, and forbid the defendant taking the lumber.

It cannot be said that Brown was warranted in buying, for the reason that Gragg allowed Foss to sell.

1. Because any sales of previous years to other persons, had nothing to do with this sale.

2. Because in *all* sales of all years, it did not appear that Foss sold without the plaintiff's assent, and in this case the plaintiff swears he gave no consent, and had no knowledge, till subsequently.

3. Because of the sales of this year the defendant undertakes to show that the plaintiff was consulted, and had knowledge, but the jury have found that in said sales to Brown, for *lumber sued for*, the plaintiff had not knowledge.

4. Because it does not appear that Brown, the defendant, relied on any such a permission by silence, because the defendant swears that the plaintiff had actual knowledge, and the jury have found otherwise.

5. Because the case finds that instead of the plaintiff affirming sales made by Foss this year, he disputed them.

The defendant has had six hundred dollars, and the plaintiff sued for three hundred dollars; only one half.

It was emphatically a case for a jury to say which party was mistaken, and they have done so.

CUTTING, J. The testimony in this case was somewhat conflicting. No question of law was reserved, and we must therefore infer that it was properly administered.

Complaint is made that the jury erred in returning a verdict for the plaintiff. The parties of record were witnesses, and the case must have turned upon the degree of credit

given to the one or the other. In the opinion of the jury, it would seem that the testimony of the plaintiff preponderated. And the question presented is, was their conclusion, under all the circumstances, so erroneous as to call for the interference of the court. The plaintiff, in substance, testified that he made a special contract with *Joseph B. Foss* to receive his lumber into his dock, and to sell the same on commission, and in pursuance thereof advanced to him his three notes, amounting to the sum of $1500, and as security for such advances, was to have a lien on the lumber, and that his sales, previous to the alleged trespass, did not exceed $300. He denies all knowledge of the defendant's purchase from Foss, or that he ever consented to, or ratified the same.

While on the other hand, Foss, admitting the negotiation as to the delivery and sale of the lumber, denies the existence or creation of any lien, or that the contract in that particular was otherwise than expressed in his receipt for the notes of March 19, 1856. And the defendant testifies that the plaintiff was informed of his negotiation for the purchase of the lumber in dispute, and neither then, nor any time at or previous to the sale, made objection or claimed any interest therein adverse to the title of his vender.

Both parties, as appears from their documentary evidence introduced, claim title under Foss, and any interest of third persons, not necessarily intervening in this controversy, must be disregarded. From his testimony we infer the relation of consignor and factor, with advances from the latter to the former, which at common law would create a lien on the goods consigned, and this inference is further sustained by evidence introduced without objection, that such was the custom of the place. The receipt produced, which Foss says was the only contract, is not inconsistent with such instruction, if otherwise, the parol testimony tending to prove that fact should have been objected to, but being in the case without objection, it must have its force and effect.

But it is contended that Foss was only the agent for certain owners, and as such had no authority to pledge the lum-

ber to the plaintiff that he could sell, but not incumber. And to sustain this proposition his testimony is principally relied on. If he was not the owner or invested with ample authority to contract with the plaintiff, then, if the plaintiff has stated truly, as to which the jury were the judges, he presents himself as the willing instrument in the perpetration of a fraud, either for his own benefit or that of his principals, for by giving security on the lumber delivered or to be delivered, he received the plaintiff's notes to the amount of $1500, and as to that act of his agency we hear of no repudiation. And presuming that the jury was properly instructed in matters of law as to Foss' authority, we cannot say that they came to a wrong conclusion. We doubt whether any principle has been disclosed by Foss, against whom, on his evidence, the defendant can maintain an action on his implied warranty of title, if he fails in this suit. If he thinks otherwise, he can test that question.

The whole subject matter in controversy then, is reduced to this. Did the plaintiff know of the defendant's purchase or negotiation to purchase, and did the former consent or conceal from the latter his claim on the property? If so, he would be guilty of a fraud and estopped to deny the defendant's title so acquired. Upon this point the parties of record are directly opposed, and Foss' evidence aids that of the defendant. Various considerations, undoubtedly, were urged by the learned counsel upon the consideration of the jury to induce them to believe the one and discredit the other party, and in view of all the circumstances we cannot say that their verdict was so erroneous as to call for our interposition.

Motion overruled, and
judgment on the verdict.

EBENEZER S. COE *versus* ALLEN H. BICKNELL.

Where it was agreed that the plaintiff should retain the ownership of lumber until certain notes given him by the owner should be paid, and he was in possession at the time of the attachment by the creditors of the maker of the notes, he will be entitled to hold it against them.

REPLEVIN. On REPORT by APPLETON, J.

The facts appearing in the opinion of the court, renders their repetition unnecessary.

G. W. Ingersoll, counsel for the plaintiff.

S. H. Blake, counsel for the defendant.

GOODENOW, J. This is replevin of 50 M. boards. Writ is dated August 29, 1856. Plea the general issue and property in Paul Varney, and an attachment by the defendant, as the property of said Varney, July 14, 1856, on a writ in favor of Joseph M. Hodgkins et al.

By the agreement between Coe and Varney, dated September 1, 1855, it was stipulated that said Coe should retain the complete ownership of the lumber until certain notes given by said Varney to said Coe should be paid.

The plaintiff testified that, after making the contract with Varney of September 1, 1855, Varney commenced taking boards from Hayward & Co.'s dock, raft by raft, as he could get them, and piled them in I. Curtis & Mitchell's Mills wharves, Hampden, and on Crosby's wharf, Bangor; that he kept the plaintiff informed from time to time, how he was getting along, in summer and autumn of 1855, or winter of 1856, after the boards were all piled out. That Varney went on to each of the piles with him, and pointed them out to him; that the plaintiff marked them and took delivery of them. On cross-examination the plaintiff stated, "the object of my going to see the boards was, to see where they were piled, so that I could identify them, or otherwise take a delivery. I do not know as Varney called it a delivery. I sup-

pose he did. He said, 'I want you to understand this pile is yours; that pile is not; that is, and so on.'"

By the contract, it seems that Coe, instead of the claim for stumpage against Hayward & Co., was to have the boards of Varney, giving Varney an interest in the profits. Varney negotiated the trade, took a bill of sale from Hayward & Co., and as the consideration or purchase money was furnished by Coe, Varney agreed that Coe should retain the ownership of the lumber till the notes spoken of above, should be paid. We are of opinion that the testimony proves that the boards were duly delivered to the plaintiff, as he was in possession of them when they were attached; and that he was entitled to hold them against Varney and his creditors, and that the defendant, according to the agreement of the parties, must be defaulted.

ESTHER BERRY *versus* JOSEPH Y. BAKEMAN.

Proof that the plaintiff in an action for the breach of a promise of marriage, is a loose and immodest woman, and that the defendant broke his promise on that account, is a bar of the action; but if, when he made the promise, he had knowledge of these facts, it is no defence.

A breach of the criminal law by the plaintiff is no bar to a suit for breach of a promise to marry, especially where there is no evidence that the defendant was informed thereof or refused to marry the plaintiff on tha account; but may be given in evidence upon the question of damages.

This action is for an alleged BREACH OF PROMISE OF MARRIAGE by the defendant, and comes before the full court upon EXCEPTIONS, the verdict being against him, to the rulings of APPLETON, J.

The defendant introduced evidence of the plaintiff's bad character for chastity generally, and evidence tending to prove specific acts of immodest, unchaste, and criminal conduct on the part of the plaintiff with other men, particularly

with one Foss. On these points rebutting evidence was put in by the plaintiff.

The evidence in this case showed that the defendant was a widower, fifty-two years of age, and resided in Oldtown. The plaintiff was twenty-eight years of age, and worked in the defendant's family as a "hired girl," before and up to the time of his wife's death. That after her death the plaintiff kept house for the defendant at two or three different periods, up to the first of May, A. D. 1854. That she did not live with or keep house for the defendant after the first days of May, A. D., 1854. There was evidence that he continued his attentions to April, 1855, and there was evidence that the plaintiff was addicted to the use of profane language, and had threatened to take the life of the relatives of the defendant's deceased wife; and it was proved that she cannot read or write.

The defendant's counsel requested the judge presiding to instruct the jury that if the plaintiff was guilty of profane cursing and swearing, and that she made threats against the family of the defendant's deceased wife if they objected to her having charge of the defendant's children; that such profanity and cursing and swearing, and such threats made by the plaintiff after she had left the defendant's house the last time, if believed by the jury, would be a sufficient justification for the defendant to break any promise of marriage, if any such existed at that time between him and the plaintiff.

The judge declined to give these instructions, but instructed the jury that this evidence was proper for their consideration in determining the rights of the parties, with the other evidence in the case in reference to the question of damage, to which the plaintiff might be entitled, if entitled to recover.

E. Kent and *J. E. Godfrey*, counsel for the plaintiff.

C. P. Browne, counsel for the defendant.

TENNEY, C. J. In law, the proof that the plaintiff, in an action for the breach of the promise of marriage, is a loose and immodest woman, and that the defendant broke his prom-

ise on that account, goes in bar of the action; but if it should appear that when he made the promise, he was aware of these circumstances, it is no defence. *Irving* v. *Greenwood*, 1 Car. & Payne, 350.

In the case of *Leeds* v. *Lock and als.*, 4 Esp., 256, which was an action for breach of promise of marriage, Lord Ellenborough said, "That though a promise to marry was proved, yet if it appeared that the plaintiff was a man who had conducted himself in a brutal and violent manner, and had threatened to use her ill, she had a right to say that she would not commit her happiness to such keeping, and she might set it up as a good legal defence; but he considered that the gross manners of the plaintiff only went to the damages, and not to the verdict. The action may be barred on other and various grounds. And it may well be said generally, that whatever misconduct in the party who brings the action, unknown to the other party, when the contract was made, or occurring subsequently, and when made known to him, he refuses to fulfill the promise, tending necessarily to destroy the confidence essential to connubial happiness, and suited to defeat the great purposes of the marriage relation, may properly absolve him from his obligation, and be a defence.

But no case has been found, which sustains the principle, that a breach of the criminal law in the plaintiff, accruing after the promise, or before the promise, of which the party contracting is ignorant, will necessarily be a bar to a suit. It is a criminal offense for a person to trade or do any work on the Lord's Day, works of necessity and charity excepted, but it cannot be contended that proof of such offense will be a legal answer to an action for a breach of the promise to marry the plaintiff, when it cannot be invoked in a defence in any other action of assumpsit.

Profane cursing and swearing is evidence of a depraved taste, as well as of a disregard of moral propriety, in one who will indulge in their use. Threats to take the life of a human being, even if not intended to be executed, evince grossness

of manners; and if uttered under the influence of excited and angry passions, may well be regarded as the fruit of feelings of a highly malicious character. But neither can be considered a bar to a suit like the present, as an imperative rule of law, even if the defendant on that account should immediately upon being informed thereof, refuse to fulfill his promise.

The instruction, that the use of the language, as represented in the testimony by the plaintiff, was proper for the consideration of the jury, in determining the rights of the parties, with the other evidence in the case, in reference to the question of damages, was not erroneous.

The case does not find that any evidence was introduced tending to prove that the defendant refused or declined to marry the plaintiff, on the ground that she had made use of the offensive language imputed to her, or that he had been informed thereof; nor was the instruction requested upon any such hypothesis, and therefore the judge did not err in the refusal, even if such conduct would have barred the suit, for the breach of his promise, for that reason. *Irving* v. *Greenwood*, before cited.

Exceptions overruled.
and judgment on the verdict.

RUFUS DWINEL *versus* SAMUEL VEAZIE.

The owner of a mill privilege has no right to raise a head of water so high as to injure the operations of an older mill above his dam, or to obstruct the public use of the river, as a stream navigable for boats, rafts and lumber.

Every mill owner has a right to the use of the water above and below his mill, so far as such use is reasonable and conformable to the usages and wants of the community.

Where one turns the waters of a navigable river from its accustomed bed, the public have a right to use it in its new chanel, and if the new channel becomes obstructed, they have a right to effect a suitable passage over the former channel, causing no unnecessary damage thereby.

Dwinel *v.* Veazie.

This is an ACTION OF THE CASE upon the following declaration, and comes before the full court upon EXCEPTIONS to the rulings of CUTTING, J., and on MOTION for a new trial.

The exceptions only are considered by the court.

In a plea of the case for that the plaintiff is, and at the time hereinafter complained of, was seized in fee simple and in possession of certain real estate in Oldtown, in said county, consisting of a water power and privilege for mills, with appurtenances, at a place called Lower Oldtown, on Penobscot river, a public way in said county—said Dwinel having at said place a dam, upon which are at this time four up and down saw mills, two clapboard mills, and two shingle mills and machines, with lathe mills and other erections, said mills being known as the Dwinel Block—and being mills next below mills at Oldtown Falls, known as the Veazie mills, belonging to the said defendant. That besides said mills, privileges and appurtenances, the said Dwinel has certain dams and erections and the right of maintaining the same between said Dwinel mills and said Veazie mills, on said river—and also the mill pond and head of water—booming grounds and running ground for logs—the shores, with all the improvements and privileges, and easements, which have been for years used and enjoyed by the said Dwinel mills, and lying between the two places aforesaid;

And that the main and westerly channel of said Penobscot river, between said two blocks of mills, has, before the act complained of herein, flowed near the westerly bank of said river, and would have flowed and belonged there had there not been an illegal and improper diversion.

But the said Veazie, at said Oldtown, in June last, removed certain bottom and materials below his said mills, from the bed of said river and westerly channel, so that said channel and river between said points has been nearly or entirely diverted, and a new bed or way was thereby created for said river, carrying the water from said Dwinel's mills and not returning the same; whereby said Dwinel's property, of great value, has become depreciated and of little or no val-

ue, and whereby he has been at great expense and labor at attempts to repair the same; and has been greatly damaged in his business and logs and lumber, for the time since the acts complained of were done, and suffered much other injury and wrong on account thereof.

Also for that said Dwinel, having been for years possessed of said rights and estate as aforesaid, and said Veazie having owned for many years as aforesaid, the said Veazie for a series of years prior hereto, up to the date of this writ, at said Oldtown, has filled up and obstructed the said channel and mill pond with slabs and edgings, and other waste stuff of lumber, so that the channel of said river between said two points has been choked and finally diverted, and said Dwinel's mill pond has been filled up, whereby he has been put to great annoyance and expense in driving and booming his logs and managing his lumber and operating his mills, and been otherwise much annoyed and injured, and been deprived of a reasonable use of his privileges as aforesaid.

Also for that said plaintiff and said defendant, being possessed as aforesaid, and situated as described in the counts aforesaid, the said Veazie has, in the use of his said property, been unmindful of the rights of said Dwinel below, and said Veazie was aware fully that any waste stuff of lumber thrown from his said mills into said stream would not pass below said Dwinel's mills, but would stop in his mill pond and above, and become in time sunken and obstruct said channel and the passage for said Dwinel's logs and lumber; still, regardless of the consequences for the last six or ten years past, he has thrown and sluiced and allowed and directed and assisted to be thrown and sluiced from his said mills, said slabs and waste lumber, until said Dwinel's mills, privileges and property aforesaid, have been nearly or quite destroyed, and the damage as aforesaid and much other injury has ensued to him.

Also for that said Veazie, at said Oldtown, in June last, with force and arms, tore away a side dam of said plaintiff's, making a breach therein, and turned the water of said Dwi-

nel's pond through said breach, and diverted said Penobscot river from its natural channel and from its course, as enjoyed by said Dwinel and those under whom he claims, for the last fifty years.

The defendant's counsel contended that the natural channel from the defendant's mills for rafts and drift, being down the channel across which the plaintiff had erected his mills and dam, the defendant had a right at all times to the use of it in its natural state, for purposes of running rafts and waste from his mills, or to some other channel or outlet equally beneficial; that this right could not be barred by an adverse use of twenty or even fifty years; that if the plaintiff would stop up this channel by affording another in its stead, and this latter did not vent or give passage to such rafts and drift equal to the natural channel, the plaintiff could not complain of any injury which he might suffer for any such deficiency, nor recover damages therefor.

That the plaintiff having erected the side dam for the accommodation of his mills, with a sluice through it, and this having remained there for more than twenty years, the plaintiff was bound to keep said dam and sluice in good repair and safe and convenient for the navigation from Veazie's mills; and that if the same became unsafe or impracticable to navigate as aforesaid, the defendant was justified in making a reasonably good passage through another practicable part of the dam, wherever it might be reasonably done, and especially through the breach which had been made by the freshet.

That for this purpose, as owner of the soil under the water where this reef of edgings was, he was fully justified and had a right to remove the edgings to a reasonable extent, the same having been placed there wrongfully by the plaintiff's agency on the defendant's land.

That if by reason of increasing the height of his dam at the mills, or by the erection of the piers and booms as aforesaid, the plaintiff had been instrumental in causing the drift to float into and settle in the plaintiff's mill-pond, which

would otherwise have gone by down the stream, the plaintiff could not recover for any injury resulting therefrom.

That the defendant's predecessor in title, having erected his mill prior to the erection of the plaintiff's mills and dam, the latter was subject to the prior right which the defendant had to float his drift down the plaintiff's channel from his mill, by the natural channel or another equally as beneficial, he exercising a reasonable caution in doing so, and not putting in any such as he had reason to suppose would sink or cause an obstruction.

And any injury occasioned by his not furnishing such channel, upon closing the natural channel, cannot give the plaintiff a right to damages.

The court instructed the jury:

1. That the prior erection of the defendant's mills on his privilege gave him no superior rights over the plaintiff, but that the plaintiff's rights were the same in all respects as though no mills had been previously erected above on the stream, so *far as this case is concerned*—that no priority of occupation for less than twenty years gave any such prior or higher right.

2. That twenty years' peaceable possession and enjoyment gave the plaintiff a right to maintain his dam to the extent he had so used the same, for the purposes of raising a head for his mills, and navigating his logs—that he would have no title to the basin for other purposes. That he would have no right to obstruct the navigation of the river, but must give a suitable and convenient passage for logs, lumber, and whatever could be floated there in its natural state. That all property of this kind is incidentally liable to much injury by saw dust and drift stuff, as mills are ordinarily used, and must be subject to all such, if ordinary care would not prevent it. That if the defendant had permitted, through the want of ordinary care, waste stuff to be thrown into the stream to the plaintiff's injury, by sinking in his mill-pond, he would be liable for all which ordinary care and prudence would have prevented; notwithstanding that in the natural

state of the stream, without the erections made by the plaintiff, such drift might have gone down and not settled in the stream.

3. That if the erection of the piers and booms in the basin in front of the defendant's land by the plaintiff or his predecessors in title, had contributed to the injury complained of, by directing drift from the defendant's mills into the plaintiff's mill-pond, which would not otherwise have gone there, then the plaintiff could not recover unless the defendant had consented to such erection.

4. That the dam at the plaintiff's mills, having existed for more than twenty years, with a waste way over it for the passage of drift or waste stuff, the defendant had a right to have it so remain and the plaintiff had no right to stop the waste way up; but the defendant could not claim to have it kept open except for such a number of mills as he had when the prescriptive right was perfected, and that he had no claim to have the waste way kept open to discharge any of the drift stuff or waste from any new mills subsequently erected.

5. That the plaintiff was bound to keep the side dam and sluice through it in good repair, and safe and convenient for the use of those who would navigate the water from Veazie's mills—and that he committed a wrong if he permitted it to remain out of repair and unsafe. But if it were so out of repair and in an unsafe condition, and inconvenient, even for an unreasonable time, yet this did not jnstify the defendant in cutting through the reef of drift for the purpose of making a channel through the breach in the dam, whereby rafts might be floated from the mill to the main river, if thereby the water was diverted from its natural or accustomed flow to the plaintiff's mills, but it was the defendant's duty to repair the breach, and then seek his remedy against the plaintiff, instead of making the cut.

6. And the fact that the cut made by the defendant for that purpose was through a reef formed by edgings and drift on the defendant's own land, did not give him a right to

make it, though it was erected there by the plaintiff on the defendant's land, if it caused such a diversion.

7. That if the defendant leased the mills during the time covered by the plaintiff's writ, and the lessees had committed the injury complained of, the defendant would not be liable, unless it was in his power to control and prevent them by use of common care and prudence—but if he could so control and prevent them by such care and prudence, and did not, then he would be liable for all the injury by such neglect.

8. That the measure of damages for such diversion of water would embrace a reasonable rent of the plaintiff's mills for such a length of time as it would reasonably take to repair the breach in the dam, so as to restore the water to its former channel.

Other instructions were given which are not excepted to.

The jury returned a verdict for the plaintiff for $6000.

To the several rulings and refusals aforesaid, the defendant excepts and prays that his exceptions may be allowed.

J. A. Peters, counsel for the plaintiff.

A. W. Paine and *G. W. Ingersoll*, counsel for the defendant.

HATHAWAY, J. Penobscot river is navigable for boats, rafts, and lumber, above and below Oldtown Falls. In the river are sundry islands, which so divide the waters as to make an east and a west channel. Goat island is near to, and next below the falls, and Webster's island next below that.

The defendant owned a mill privilege at those falls, on the west channel of the river, and he and those from whom he derived his title, have owned and occupied it as *such*, ever since 1801.

The plaintiff owned a mill privilege on the same channel, about half a mile below the defendant's mills, which privilege has been owned and occupied by the plaintiff and those from whom he derived his title since 1803. When the dam was built on the plaintiff's privilege, in 1803, no sluice or passage

way was made through it for running rafts, but instead thereof, the owner of it built a side dam from Webster's island to Goat island, and made a sluice through it, near its lower end, which dam and sluice were ever after kept in repair by the owners of the plaintiff's mill site, until 1854, and the sluice was always used by the owners and occupants of the mills on the defendant's privilege, for running rafts of lumber from their mills into the eastern channel of the river, where they could be floated to market.

"A *bank* of drift stuff, slabs, &c., accumulated in the river, between the plaintiff's and the defendant's mills, which bank extended down the stream from the western side of Goat island, narrowing the channel, and leaving a large basin on the east side of the bank, between said bank and the side dam, around the lower end of which bank was the channel or passage for rafts to the sluice.

In the spring of 1854 a breach was made in the side dam, and a part thereof, near the upper end of it, carried away, by reason of which the floating of rafts through the sluice became impracticable or dangerous. The plaintiff had due notice of the breach in the side dam, but did not repair it. Whereupon the defendant made a cut through the "bank of drift stuff, edgings, and slabs," through which rafts could be run from his mills, and thence through the breach in the side dam, to the eastern channel of the river.

The cut made by the defendant through the "bank of drift stuff," &c., diverted the water, or a considerable portion of it, from the plaintiff's mills, to his damage, for which this action was brought, and also for filling up and obstructing the channel of the river and the plaintiff's mill-pond. The case is presented on exceptions, and a motion for a new trial.

The defendant contends "that no action can be maintained for any damages sustained by the plaintiff from the filling up of his mill-pond by edgings and drift stuff, even though the facts be as alleged by him," for, "that the wrong done, if one, is of a public and general nature."

The allegation in the second count in the writ, is, that the

defendant had "filled up and obstructed the said channel and mill-pond with slabs and edgings, &c., so that the channel of said river has been choked and finally diverted, and the said Dwinel's mill-pond has been filled up." We cannot doubt that this is a sufficient allegation of special injury to maintain an action, according to the authority of *Stetson* v. *Faxon*, 19 Pick. R., 147, and other cases cited in argument by the defendant's counsel.

When the defendant's mill privilege was first occupied, as *such*, in 1801, the owner thereof had a right to the use of the water for his mills, subject to the rights of the public to the use of the river as a stream navigable for boats, rafts and lumber, and when the plaintiff's mill privilege was first occupied, as such, in 1803, the rights of the owner thereof, and his duties to furnish facilities of passage to the public at his mill-dam, were the same as those of the owner of the upper privilege, neither of them having the right, by his dam, to raise a head of water so high as to injure the operations of an older mill above his mill-site. The defendant had a right to the use of the water above his mills, to float logs to them, and also to the use of the water below them, to float rafts and lumber to market, and also to float away the waste stuff from his mills, so far as such use was reasonable and conformable to the usages and wants of the community.

His right of way was in the waters, and the plaintiff had no authority to prevent its use. The owner of the plaintiff's privilege had a legal right to erect and continue his dam and mills, but he was bound to provide a way of passage for the defendant's rafts. *Brown* v. *Chadbourne*, 31 Maine R., 9.

The plaintiff proved by Ebenezer Webster that there was no channel between the two islands when the side dam was built between them, and that rafts could run out between them *only* when the water was high.

The original erection of the dam, on the plaintiff's privilege obstructed the flowing of the waters, so that they could not be used *there* as formerly, for floating rafts. The effect of the plaintiff's mill-dam, the side dam, and the sluice, was

to raise the waters to be used for floating rafts from the defendant's mills, and turn them into a new channel between Goat island and Webster's island.

It was held by the court in *Dwinel* v. *Barnard*, 28 Maine R., 554, that "should a person obstruct the flow of the waters of a river or stream over their accustomed bed, so that they could not be used as formerly for the purposes of boating or of floating rafts or logs, and should turn them into a new channel, he would thereby authorize the public to use them in the new channel, as they had been accustomed to use them in their former channel."

The owners and occupants of the mills on the defendant's privilege had used the new channel between those islands over fifty years, running their rafts through the sluice until they could not safely use it longer, by reason of the breach in the side dam above the sluice.

The defendant had a right to use the water for floating his rafts. The channel had been obstructed by the plaintiff's mill-dam, and the waters to be used for floating rafts, had been turned into a new channel, which was in such a condition that it could not be safely used without expensive repairs, which it was the plaintiff's duty to make, or to provide some suitable passage way, which he neglected to do, after notice. The defendant had all the rights of passage for his rafts through the side dam which he would have had through the mill-dam, if the side dam and sluice had never been made, and he had a lawful right, in the use of reasonable care, and causing no unnecessary damage to the plaintiff, to effect a suitable passage for his rafts. And whether in doing it he used such care, or caused any unnecessary damage to the plaintiff, is a question of fact, which should have been submitted to the jury.

The defendant would not be liable for the tortious acts of his lessees, unless authorized by him. *Rich* v. *Barterfield*, 56 Eng. Com. Law R., 783; *Regina* v. *Watson*, 2 Ld. Raymond, 856; *Earle* v. *Hall*, 2 Met. R., 353; *Hilliard* v. *Richardson*, 3 Gray's R., 349; *Wyman* v. *Farrar*, 35 Maine R.,

64. And the case furnishes no evidence that they were authorized by him to do any unlawful act to the plaintiff's property. So far as the instructions given to the jury, are conflicting with our views of the law upon the questions presented in the case, and considered by the court, we think they were erroneous. The exceptions are sustained. The verdict is set aside, and a new trial granted.

It is not necessary to consider the other questions presented on the motion.

SAMUEL HAZELTINE *versus* NATHANIEL J. MILLER.

The authority of an agent to act for, and bind his principal, will be implied from the accustomed performance by the agent of acts of the same general character for the principal, with his knowledge and assent; but a general authority to an agent to collect debts, and to pay and receive money, does not authorize him to bind his principal by negotiable instruments; nor can an agent having authority to collect money for his principal, arising from the use or proceeds of the sale of his property, bind him by entering into contracts for which money is to be paid out.

There must be proof of agency before the declarations of the agent are admissible, and then only such as are strictly part of the *res gesta*.

This is an ACTION OF ASSUMPSIT upon an agreement signed "Wm. R. Miller, Agent," and was defended upon the ground that he had no authority to bind the defendant by an agreement for such purposes as are embraced therein.

CUTTING, J., presiding at *Nisi Prius*, ordered a nonsuit; to which, and to the rejection o certain evidence, the plaintiff excepted.

E. Kent, counsel for the plaintiff.

J. A. Peters, counsel for the defendant.

This case, upon a mere legal look at the thing, appears to have been rightly nonsuited.

The facts most favorably stated for the plaintiff, are just

these: The defendant owned certain mills and land connected therewith, in the town of Howland. Wm. R. Miller had rented the mills and sold stumpage from the land. Now did that authorize Wm. R. to make a contract for the defendant, to have lumber *cut and hauled*, and on other land? He never had even made such a contract on the mill land. He had *sold*, but never *bought*.

The question is not whether there is evidence tending to show, but is the plaintiff's testimony sufficient to authorize a verdict?

There is not even testimony, taken by itself, tending to show an authority. If there is, there will be too much danger for one man even to employ another.

The key to this case does not appear, as the defence was not reached, but it may be stated as a supposition, and will test the plaintiff's pretension.

There is not a particle of testimony in this case showing any authority in Wm. R. Miller, to bind the defendant to pay money—to make contracts to pay money—to assume responsibilities. Such an inference of a general agency would be destructive of all business delegation of authority.

There is no evidence of a general agency. It is not every act of employment, which renders a party an agent. A clerk with authority to sell goods, has no authority to buy goods, and give his employer's note. Nor does an authority in this case, to rent mills and rent lands, authorize Wm. R. Miller to make a contract foreign to renting mills and lands.

Here was a mere limited authority for certain definite purposes. For appropriate illustrations, see cases of *Webber* v. *Williams College*, 23 Pick. R., 302; *Nash* v. *Drew*, 5 Cush. R., 424; *Tabor* v. *Cannon*, 8 Met. R., 456; *Calef* v. *Foster*, 32 Maine R., 92.

The testimony was rightly rejected. The plaintiff could call Wm. R. Miller as a witness.

RICE, J. No rule of law is better established, or more universally recognized, than that the authority of an agent,

to act for, and bind, his principal, will be implied from the fact that such agent has been accustomed to perform acts of the same general character for that principal, with his knowledge and assent. Nor is it necessary, in order to constitute a general agent, that he should have done before an act, the same in specie with that in question. If he have usually done things of the same general character and effect, with the assent of his principal, that is enough. Thus it was held in *Bank of Lake Erie* v. *Norton*, 1 Hill R., 502, where, by articles of co-partnership, one Norton was created agent of a firm, but his authority, as thereby defined, did not extend to accommodation acceptances. It was proved, however, that he was the general agent of the firm, and with their knowledge and assent, was in the habit of drawing bills, and making notes and indorsements for them; though the specific act of acceptance was not mentioned in the evidence, as one that had been usually done, the court decided that his general power, and the usage of putting the firm name to commercial paper, in all other shapes, was the same thing, in substance, and calculated to raise an inference in the public mind that he had such a power.

But the acts from which authority to do a specific act can be implied, must be of the same general character and effect. Thus it was held in *Tabor* v. *Cannon*, 8 Met. R., 456, that an agent who is employed by the owners of a whale ship, to fit her for sea, and purchase the necessary supplies for her voyage, cannot bind the owners by making a negotiable note, or accepting a negotiable bill of exchange in their names, as agent, in payment for such supplies. The court, in their opinion, remark, there is good reason for this distinction. In a contract of sale, the owners can be liable to no one but the actual sellers of the goods; the consideration may be inquired into; all the circumstances attending the sale may be shown; and all payments and offsets may be adjusted; all which would be precluded if an action could be maintained by the indorser on an acceptance.

In *Webber* v. *Williams College*, 23 Pick. R., 302 which

was on a note given by Mr. Fessenden, of Portland, as agent for the defendants. Mr. F. was agent for the defendants, at Portland, to manage some interests of theirs growing out of some eastern lands. To avoid an apprehended troublesome controversy, Mr. Fessenden was authorized to advance to a Mr. Ingersoll, one or two hundred dollars, to assist him in paying off a large highway tax. Instead of advancing the money, Mr. Fessenden gave the note in suit. The court held that the note was made without authority, and was not binding on the defendants.

A general authority to an agent to collect debts, and to pay and receive money, does not authorize him to bind his principal by negotiable instruments; such an authority must be expressly conferred or reasonably implied from the nature of the business to be done. *Rossiter* v. *Rossiter*, 8 Wend. R., 496.

In the case at bar, the evidence shows satisfactorily that W. R. Miller was an agent for the defendant. That in that capacity he carried on his mills, at the mouth of the Piscataquis; that he paid the taxes on the defendant's property; that he gave permits for cutting timber on the defendant's lands in Howland and Edinburgh, and collected the stumpage therefor; that he settled and received pay for lumber cut upon the defendant's land without authority. There was also evidence, that on one occasion he gave a note to the town of Howland, as the agent of the defendant. There is no evidence, however, that he had any authority to give that note, or that the defendant had any knowledge of its existence till long after it was given, or that he has ever recognized it as a valid note, against him.

Now there is a wide distinction between authority in an agent to carry on mills for the owner; to permit parties to cut timber on his lands, and collect the stumpage therefor; to claim indemnity from trespassers; and authority to enter into contracts for carrying on lumbering operations, by which the principal was to be obligated to pay large sums of money. In the one case the agent would be, in different

modes, collecting for his principal money arising from the use, or proceeds of the sales of his property; in the other, he would be embarking that principal in business enterprises which might involve large pecuniary liabilities and losses. Authority to embark in enterprises of the latter description, could not be implied from an admitted agency, with authority to perform acts of the former character.

As to the testimony of the witness, Muzzey, taken in connection with the letter of the defendant, it restricts, rather than enlarges, the authority of W. R. Miller, as the agent of the defendant. No implication of authority to enter into the contract in question, can arise from that transaction.

The declarations of W. R. Miller were properly rejected. There must be proof of agency, before the declarations of the alleged agent are admissible in any case; and then only such declarations as are strictly part of the *res gesta.* There being no proof of authority in the agent to perform the principal act, his declarations, while in the performance of that act, are, as matter of course, inadmissible.

It may well be doubted whether, by the terms of the instrument itself, any persons other than the plaintiff and William R. Miller, are bound by it. But as this point was not raised in the arguments of the counsel, we express no opinion upon it. The nonsuit must stand.

Exceptions overruled.

COUNTY OF WASHINGTON.

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GEORGE HUSTEN ET AL. *versus* JOSEPH RICHARDS.

Where there is a chartering of the whole vessel under and over decks, on the one part, and on the other part an agreement to pay a given sum for the *use of the vessel*, the agreement will be treated as a contract of hiring, rather than of affreightment.

Under such an agreement, the cargo offered must be suited to the capacity of the vessel, and the owner is not bound to alter his vessel to accommodate the freight, and damages may be recovered for the difference between the contract price and what the vessel might have earned by pursuing the voyage with other freight; and for necessary delay.

This case was REPORTED by HATHAWAY, J., and is an action of ASSUMPSIT upon the following contract:

"Agreement made and concluded between Captain Jerome Eaton, Agent for owners of schooner Susan Husten, and Edmund A. Souder & Co., Agents for Joseph Richards, that the party of the first part agrees to the chartering of the whole of said schooner, under and over deck, for a voyage from Bangor, or Mill Creek, to Philadelphia, and the party of the second part agrees to furnish to the said schooner a cargo of spars or other materials, and pay for the use of the vessel four hundred dollars, upon delivery of cargo in Philadelphia. Signed, E. A SOUDER & Co.,

Agents for J. RICHARDS & Co.

JEROME EATON, Agent for Owners."

April 15, 1853.

George W. Dyer, counsel for the plaintiffs.

The plaintiffs should recover in this action, because

1. The defendant entered into the contract of affreighment with the plaintiffs, by a writing executed by persons compe-

tent to bind these parties, which contract did bind them, and there has been no payment or satisfaction.

It is admitted that the plaintiffs were the owners of the Susan Husten, at the date of the contract, and it is proved that Eaton, one of them, was the master of the vessel, whose authority to act for the owners has been ratified by suit, if any ratification had been necessary, and that E. A. Souder & Co. were the agents of the defendant, duly authorized to act for him in hiring the vessel.

2. The plaintiffs offered to fulfill their part of the contract, and were able, ready and desirous to take the cargo mentioned in the charter, or any other cargo, which the vessel could carry without enlargement of her port-holes.

3. The defendant's agent, having examined the vessel in Philadelphia, as did also the defendant himself, and the charter being for the particular vessel, the defendant was bound to furnish such a cargo for her as she could take in and carry without enlargement of her port-holes, or making any material alteration of her hull. And the plaintiffs were under no obligation to enlarge the port-holes, or to make any alterations in the hull of the vessel, in order that she might take in a particular cargo. *Horill* v. *Stephenson*, 4 Carr and Payne, 469, S. C.; 19 English Common L. R., 605; *Beecher* v. *Becktel*, U. S. Circuit Court, NELSON, J., reported in New York Tribune, September 24, 1853; *Thurston* v. *Foster*, 2 Fairf. R., 74.

4. The plaintiffs were excused from taking any spars, which the defendant said he had, which could not have been taken into the port-holes of the vessel, without enlarging them, or without injury to the vessel.

The defendant having prevented the performance of the contract upon the part of the plaintiffs, shall not take advantage of its non-performance, and the plaintiffs have a right of action for the damage they have sustained through the misconduct of the defendant. *Jones* v. *Barkley*, Douglass R., 694; *Hotham* v. *East India Company*, 1 Term R., 645; *Keaine* v. *Catara*, 2 Gallis R., 61; *Horill* v. *Stephenson*, 4

Carr and Payne, 469, 605; *Borden* v. *Borden*, 5 Mass. R., 67; *Bradstreet* v. *Baldwin*, 11 Mass. R., 229; *Frazier* v. *Cushman*, 12 Mass. R., 279; *Thurston* v. *Foster*, 2 Fairf. R., 74; *Beecher* v. *Becktel*, above cited.

5. It was the defendant's duty to have offered, if the vessel could not have taken the spars for which he had an order, such of the spars as she would have taken without enlarging her port-holes, and have completed her cargo with "other materials," mentioned in the charter, or else have furnished her with a full cargo of "other materials."

The reason why he did not do so, is apparent from the fact in testimony, that freights had declined after the date of the charter, and that when the Susan Husten was lying in Bangor, many vessels were lying idle there.

As to damages. In *Keaine* v. *Catara*, 2 Gallis R., 61, the rule of damages is declared to be, in such a case as this, the whole sum named in the charter. It is admitted that the rule is not uniform. If the court should not sustain the view of the law, as decided in the case referred to, it is respectfully submitted, that as reasonable, immediate, and natural damage to the plaintiffs, flowing from the act of the defendant, they are entitled to recover a fair compensation for the vessel while she was detained in Bangor, waiting for the cargo. This time appears to have been three days, which, at the rate Mr. Vickery testifies to, would amount to sixty dollars, and according to Mr. Barnard's calculation, to fifty dollars.

Also the time which the vessel was going from Bangor to Calais, it being a fair inference from the testimony, that no freight could be procured for her in Bangor, at the time she was there, in so short a time as one could be obtained in Calais, where her owners lived, which time a jury, from their knowledge of distances, of winds, and of the sailing of vessels, might reasonably infer, would be about five days, which, at the rates in testimony, would amount to eighty-three or one hundred dollars.

Also the difference between a lumber freight at that time,

of which she would carry 100,000 feet, at three dollars a thousand, making $300, and the sum named in the charter, $400, which difference would be $100. In all making a sum of $233 to $260, which would be very much less than the damage actually sustained.

Rowe & Bartlett, counsel for the defendant.

The plaintiffs were common carriers, engaged to carry a cargo of spars in their schooner for the defendant from Bangor to Philadelphia. The defendant engaged to furnish a cargo of spars or other materials to be so carried. He accordingly procured a cargo, and requested the plaintiffs to carry it. The plaintiffs refused to carry it because it was inconvenient to load. Which party has violated the contract?

The spars were twenty to twenty-four inches at the butt; the port of the schooner was of capacity to receive spars only eleven and one quarter inches at the butt; but she was suitable for carrying spars of twenty-four inches.

She was to carry spars from the port of Bangor. The usual sizes of spars in the Bangor market are from ten to twenty-four inches. The defendant was at liberty to furnish any cargo he pleased. The plaintiffs specially contracted to carry spars. There were no restrictions in the contract as to the size of the spars. The law implies none, except this, that they shall be such as the schooner was suitable to carry. Having engaged to carry spars from Bangor, without restriction as to size, the plaintiffs were bound to carry such as are usually shipped from that port, if his vessel were suitable to carry them.

It is the duty of the freighter to deliver the cargo along side, and the duty of the ship owner to take it on board and stow it. 3 Kent's Com., p. 209, 5th edition. The ship owners are bound to find ways and means of taking the cargo on board. "The ship must be fit and competent for the sort of cargo, and the particular service for which she is engaged." Abbott on Shipping, 5th Am. edition, pp. 417–18–19, and note 2. If her hatches are not large enough to receive her

cargo, they must be enlarged. If a vessel engaged to take a cargo of cotton in bales, or sugar in casks, from a particular port, her hatches must be, if necessary, made of a size sufficient to receive casks or bales of the dimensions usually shipped at that port. The same rule must hold in regard to shipping lumber.

There is no evidence that the defendant or his agent examined the port-holes at Philadelphia, or had an opportunity to do so. The defendant was not on board; his agent was; but at the time the forward part of the vessel was three quarters full of corn, so there was no opportunity of examining. His attention seems not to have been called to the size of her ports, or even the fact that she had any port. The plaintiffs knew the size of the ports. The captain, part owner as well as agent, was bound to know the fact, and his first officer also knew it, if his declaration to Atwood is to be believed; but neither of them called the attention of the defendant's agent to the fact, nor was any restriction, as to the size of the spars to be furnished, made part of the contract. Suppose the schooner had had no port, would the owners have been excused from carrying spars at all, and would the defendant have been bound to furnish a cargo of other materials? It is no uncommon thing, we believe, for ships intended for general trade, to be chartered for carrying long lumber or timber, and in such cases the owners always, as a matter of course, cut the port holes.

The plaintiffs' counsel relies upon a decision of Judge NELSON, in *Beecher* v. *Becktel*, reported in the New York Tribune of September, 1853; that is but a newspaper report, and if correct, can have no weight as authority, for it discloses the very significant fact that Judge NELSON was merely reversing the decision in the same case, of Judge BETTS, of the Southern District of New York, whose experience as an admiralty lawyer is greater, and his reputation as high as Judge NELSON'S. The report, then, merely shows that two very respectable judges have come to conclusions diametri-

cally opposite, on the questions in that case. Had Judge NELSON had more acquaintance with the vessels constructed for the lumber trade, he would not have talked as he is reported to have done about the expense of the alteration, or the danger of thereby rendering the vessel unseaworthy.

Whatever might have been the facts in that case, there is no evidence here that the alteration would have been seriously expensive, or would in any way have injured the vessel.

We submit, then, that the case shows that the defendant did furnish a cargo of spars, within the meaning of the contract, such as the plaintiff's were bound to take. The insinuation of the counsel that he wished to get rid of his contract, is not supported, but is contradicted by the testimony; for Atwood testifies that he had procured the cargo to ship.

The claim for damages here seems to us a little singular, when the plaintiffs had engaged to carry a cargo of spars from Bangor to Philadelphia, without any restriction as to size, and had refused, when spars of no unusual size were tendered, to take any but those of the smallest size to be found in the Bangor market, and such as are rarely shipped from that port to Philadelphia, and such as the plaintiffs had not to send.

Dyer, in reply:

The argument of the defendant seems to be based upon a misapprehension of the testimony. It is proposed to examine these errors in reading and in argument in their order.

The contract is not stated correctly. The plaintiffs let their vessel "for a voyage from Bangor or Mill Creek to Philadelphia," and the defendant agreed "to furnish a cargo of spars or other materials," for her to carry.

The plaintiffs *never* "refused to carry it, (the cargo of spars,) because it was inconvenient to load." The captain and the mate in charge "were ready to take in any cargo they could put on board, without cutting the vessel up;"

were ready and willing to receive such spars as he could take without enlargement of the ports of the vessel."

The law in Kent is cited correctly. "It is the duty of the freighter to deliver the cargo alongside, and the duty of the ship owners to take it on board and stow it."

The delivery alongside is prerequisite to the taking on board. There is no evidence, and there is no pretense, that the defendant ever delivered a particle of cargo alongside, or had any near the vessel; or that the plaintiffs, or either of them, or the mate in charge, ever saw one of the spars which the defendant said that he had.

By the rule of law cited by the defendant's counsel, the defendant having in no wise performed his part of the contract, which was to furnish, and, by intendment of law, to deliver the cargo alongside, was the first and the only one of the parties to break it. Moreover there is no evidence, and no pretense, that the defendant ever tendered any cargo, or *offered* any cargo for the vessel.

There is no evidence, as stated by the defendant's counsel, that the vessel's ports were of the "capacity to receive spars only eleven and one quarter inches at the butt." Evans says that he did not know how large the port-holes were. He repeats conversations tending to show that the captain understood that Richards would *furnish* no spars over eleven and one quarter inches; says that the mate told him that the captain said that the understanding was, that there should be no spars taken over eleven inches at the butt end. No one of the witnesses testifies about the size of the port-holes except Vickery. He knew the schooner well, and had owned and run vessels for twenty years. The ports were sixteen to eighteen inches—quite large enough to take in the spars ordinarily shipped from Bangor, which were from ten to eighteen inches.

Vickery's statement is misquoted by the defendant's counsel, by leaving off the controlling portion of it. He testified that "she was suitable to carry spars two feet at the butt,"

"or anything else that could be put into the hold, or carried on deck."

The ordinary sized spars in Bangor, were from ten to eighteen inches; they "*run* from ten to twenty-four inches," which is the whole range of their sizes, and not the "usual" sizes.

It is not a correct statement that "the defendant was at liberty to furnish *any* cargo he pleased," nor the subsequent proposition, by way of qualification, "such as the schooner was suitable to carry." It is apparent that the schooner would not be bound by the contract to carry, for instance, any cargo which should greatly endanger her safety, or work injury to her, or, as in this case, any cargo which could not be carried without destroying the integrity of the vessel.

"The plaintiffs did not specially contract to carry spars." They furnished the vessel, and did no more.

It is true that there was "no restriction in the written contract as to the size of the spars," but it is in evidence that it was "the understanding that there should be no spars taken over eleven inches at the butt end." The mate told the defendant, "they were to take spars not over eleven and one quarter inches in diameter at the butt."

This evidence being in no way contradictory of the written contract, was unobjectionable, and even if objectionable, was not objected to at the time of trial, qualifies the writing to the same extent as if it had been incorporated in it.

The citation from note 2, p. 417, of Abbott, means simply that the ship shall be sufficient for the voyage, in point of sea-worthiness—tight, strong, well equipped and manned. It has no such meaning as that indicated in the defendant's argument.

And in the same connection, the rules, given as law, in the defendant's argument, are not supported by any authority, and are believed to be unsound and incorrect in reason.

The true rule is believed to be that declared in the plaintiff's opening argument, and sustained by authorities, viz.: that if A agrees to carry a particular cargo absolutely, he

must furnish a vessel which will carry it; but if A agrees to furnish a vessel, and B, knowing the vessel or seeing the vessel, or having the opportunity of doing so, agrees to furnish a cargo for her, then B must furnish such a cargo as the vessel will carry without alteration.

This seems too plain to require argument, for if one alteration in a vessel may be insisted upon, so may another, to the utter destruction of the vessel.

The statement of the defendant's counsel in argument, that "there is no evidence that the defendant or his agent examined the port-holes in Philadelphia, or had an opportunity to do so," is an error. "The man who chartered her in Philadelphia, came on board of her, went below and examined her." "The man who came on board of the vessel, to charter her in Philadelphia, went clear into her hold and examined the vessel." "The forward part of the vessel was nearly three quarters full" of corn. The ports of a small vessel are high up, nearly to the beams, and would be in plain sight, and "the hatches were off. The charterer was on board twice;" "examined the schooner." "I think Richards was in Philadelphia at the date of it," (the charter.)

"I do not know whether the defendant or his agent was on board of the vessel in Philadelphia, but either one or the other of them was, certainly, and perhaps both of them, and really made an examination of her ports, as well as had abundant opportunity to do so."

As to the custom of cutting port-holes in ships intended for general trade, when chartered for carrying timber or long lumber, and the fact of its being a general practice, there is no evidence.

I have seen many ships loaded with deals for England, every year for several years, and I know that the cutting of port-holes is the rarest of occurrences, very expensive, and always reckoned as impairing the strength of the ship. I venture to say, that the hatches of any ship, unless very old, were *never* enlarged to take in cargo.

As to the enlargement of port-holes in schooners, coasters,

the evidence of Barnard is, that it is very uncommon, and of Vickery, that he never knew it to be done. It is well known in this state, where almost every man is in some sort familiar with the construction of vessels, that to enlarge the ports of a coaster from sixteen to eighteen inches, to such a size as would enable the vessel to receive spars two feet in diameter, would require the taking out of a heart hook, and the putting in of a new one, a labor of some duration, expensive, and weakening and damaging to the vessel.

All that is asked with regard to the case of *Beecher* v. *Becktel*, is a fair examination of the reasons which led Judge NELSON to his determination, and these reasons are believed to be in conformity to the principles of law, as settled in other cases.

It is apparent that the defendant wished to avoid his contract, by his whole course of conduct, and it is clear, that although he had a cargo of spars, he could have found a vessel in Bangor, when the Susan Husten arrived there, which would have carried his cargo for a less sum than that named in the contract.

"Freights from Bangor had declined from the date of the charter." There is reason to believe, that the defendant was "bluffing off" the captain from the contract, when he told him that the spars were from twenty to twenty-four inches in diameter. It is hard to believe, that the defendant was prepared to ship a cargo of spars, all of such unusual size. If he had had in reality such a cargo, and the port-holes of the vessel had been of a size to receive it, the plaintiffs would have been under no obligation to receive them. By a contract to ship spars simply, the defendant bound himself to ship those of ordinary or usual sizes, and would have had no right to have selected the very largest. The court may readily conceive, that a cargo of spars may be taken in and on board of a vessel, with considerable ease, as in practice they always are, by taking the smaller ones into the ports, and the few larger ones on deck, and any usual cargo which

the defendant honestly meant to ship by the Husten, would have been taken by her. But it is a very different affair, to attempt to take spars of two feet in diameter, and proportionably long, over sixty feet, into the hold of a small vessel, where the size and weight of the stick, and the limited space to work in, would make loading such a cargo dangerous, expensive, and tedious. It is seriously doubted, if a spar of two feet in diameter, and of proportionate length, was *ever* put into the port-holes of a coaster in Bangor.

But it sufficiently appears, in this case, that the contract on the part of the defendant or his agent, was by parol so qualified and restrained, that the defendant was to ship spars not over a certain size. There is nothing in the case to the contrary.

It was then the duty of the defendant to have furnished spars of this limited size, and the plaintiffs were under no obligation to carry others.

RICE, J. This is an action of assumpsit, for an alleged breach of a contract, of which the following is the substantive part, to wit: "The party of the first part agrees to the chartering of the whole of the said schooner, (the Susan,) under and over deck, for a voyage from Bangor or Mill Creek, to Philadelphia, and the party of the second part agrees to furnish to the said schooner a cargo of spars or other materials, and pay for the use of the vessel four hundred dollars upon delivery of cargo in Philadelphia."

This agreement was entered into in Philadelphia, April 15, 1853, the schooner then being at that port. On receiving notice that the schooner had arrived at Bangor, and was in readiness to receive her cargo under the contract, the defendant offered to furnish a cargo of spars, but which were so large that they could not be taken into the hold of the schooner without enlarging her port-holes. This, the master declined to do, and the defendant refused to furnish other freight. After waiting three days at Bangor for a cargo,

and none being offered by the defendant except the spars aforesaid, the schooner sailed for Calais, Maine, and the owners bring this action.

Whether the action can be maintained depends upon the construction of the contract, which is a mere memorandum, inartificially drawn, and entirely destitute of those specific details which are usually inserted in charter-parties, by which the rights and duties of the respective parties are defined. If the memorandum is to be treated as a contract of affreightment, in which the plaintiffs agree to take a cargo of spars for the defendant from Bangor or Mill Creek to Philadelphia, at a price agreed, then it was the duty of the plaintiffs to furnish a ship tight and staunch, and strong, well furnished in all respects, victualled and manned, and of suitable capacity to receive and transport such spars as are ordinarily shipped from those ports to Philadelphia, and a failure to furnish such a vessel would be a breach of contract on the part of the owners. 3 Kent's Com., 204. If on the other hand the contract was a hiring of the vessel by the defendant for the voyage, with a knowledge of her capacity, for the purpose of transporting or having transported in her a cargo of spars or other materials, then it was the duty of the defendant, on her rendition to him at Bangor or Mill Creek, in a proper condition to perform her voyage, to furnish her, without delay, a cargo of spars or other materials suitable to her capacity, as she was at the time of hiring, and the owners were under no obligation to remodel the schooner or in any way to change her construction.

As we have already remarked, the contract is entirely wanting in details. Its construction, however, considered in connection with the situation of the parties, is not difficult. The defendant, by himself and agent, had been on board the schooner, and had a full opportunity to examine her and ascertain her capacity before the agreement was executed. There is no suggestion of fraud or concealment on the part of the owners. No latent defects have been discovered. Under these circumstances the owners "agree to the char-

tering of the whole of said schooner, under and over deck, for a voyage from Bangor or Mill Creek to Philadelphia," and the defendant "agrees to furnish the said schooner a cargo of *spars* or *other materials*, and pay for *the use of the vessel* four hundred dollars upon delivery of cargo in Philadelphia."

Here, it will be observed, was a chartering of the whole vessel, under and over deck, on the one part, and on the other part an agreement to pay a given sum for the *use of the vessel.* There is no stipulation for carrying freight of any kind on the part of the owners, and no agreement to pay *freight*, on the part of the defendant. He simply agrees to pay four hundred dollars for the use of the vessel, and to furnish her with a cargo of spars or other materials. It does not even appear by whom she was to be sailed.

In view of these considerations we cannot doubt that the agreement is to be treated as a contract of hiring rather than of affreightment; a contract of hiring, in which the hirer knew the character and capacity of the schooner before he entered into the contract. He then took her as she was, so far as her general capacity and construction was concerned. All that the owners could be held to guaranty was, that she was sea-worthy. The defendant was entitled to load her, but he must load her with a cargo, whether it was of spars or other materials, suitable to her capacity. The case of *Beecher and al.* v. *Becktel*, decided by NELSON, J., in the Admiralty Court of New York, cited from the New York Tribune, September 24, 1853, is in point, and is sustained by sound reasoning.

The plaintiffs, therefore, are entitled to maintain their action, and the only question is as to the amount they are entitled to recover. Under their contract they would have been entitled to the round sum of four hundred dollars on delivering their cargo in Philadelphia. It was in evidence that the schooner would carry about 100,000 feet of lumber; that the freight on lumber from Bangor to Philadelphia, at that time, was three dollars per thousand. It does not appear that the owners might not have obtained a freight of

lumber, if they had desired to do so. Had they so done, the difference between such freight and the contract price for the use of the vessel for the voyage would have been one hundred dollars, which sum they must be deemed to have lost by the failure of the defendant to comply with his contract. In addition to this, the schooner remained at Bangor waiting for freight three days. The evidence shows that her time for those three days was worth from fifty to sixty dollars. We adopt the medium, fifty-five dollars. It was the duty of the plaintiffs, immediately after the breach of the contract on the part of the defendant, to seek other employment, so that no unnecessary loss should be sustained. Such seems to have been the course adopted by them, and there is no evidence of any greater loss having been sustained than the items referred to above.

A default is therefore to be entered, and judgment for one hundred and fifty-five dollars damages, with interest from the date of the writ, and costs.

ROBERT STICKNEY ET AL. *versus* EDMUND MUNROE.

Where one without right has diverted water from the mill of another so as to diminish its power of performance to the extent of its capacity, he will be liable in damages therefor, and he cannot excuse himself by the fact that the owner of the mill has, by entirely independent acts, caused a loss to himself.

Although the principal is held liable to third parties in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances and omissions of duty in his agent, *in the course of his employment*, where the principal did not authorize, justify or participate in such misconduct, or if he had no knowledge of, or, knowing, disapproved and forbade it; yet, where an agency was limited to the business of keeping mills in repair, leasing the same, and receiving rents therefor, he is not liable for the acts of a lessee of a mill in excavating the bed of the river, thereby causing damage to a neighboring mill owner.

Stickney *v.* Munroe.

This is an action ON THE CASE, for diverting water from the plaintiff's mill.

EXCEPTIONS were filed to the rulings of HATHAWAY, J., and the whole evidence is by him reported upon a motion for a new trial.

The plaintiffs' attorney requested the following instructions:

1st. That if Lowell, the agent, was permitted by Munroe to take, and continue for a series of years the general management of his mill property at Calais, third persons would have the right to regard him as general agent for that purpose, and to hold the principal responsible for the acts of such agent to the extent of such permission, and would not be affected by a power of attorney limiting his authority without notice.

2d. That the receipt of rent and omission to terminate the tenancy of Tinker, if he had an opportunity to expel him for breach of condition in his lease, would be a ratification of his previous act in making alterations in the property he occupied.

The defendant's attorney requested the following instructions:

1st. That the plaintiffs cannot recover for any alleged damage on account of the defendant drawing water from the stream to supply his mill, if the jury find there was sufficient water for all the mills.

2d. That the plaintiffs cannot recover for any deficiency of water occasioned by the defendant or his agent or lessee drawing water, unless they have evidence and are satisfied that he has notified the plaintiffs of such deficiency, and requested him to lessen his rents.

3d. That this action cannot be maintained, provided the jury are satisfied that the plaintiffs by their acts or the acts of their agent, servant, or person in their employment contributed in any degree towards the injury they allege in their declaration, they have sustained.

4th. That the defendant is not by law liable for the dig-

ging or excavating alleged to have been done, unless they are satisfied that the defendant did it himself or commanded it to be done; or having previous knowledge of it, ratified and adopted it, claiming the benefit of it.

5th. That if the jury believe all the evidence of the case, the defendant is not liable, and this action cannot be maintained.

Of the instructions requested by the plaintiffs' attorney, the first was given and the second refused. And of those requested by the defendant's attorney, the first and fourth were given and the others refused.

The words in Sherman's deposition, "I should think there would be 200 M. to a saw difference in a season," was objected to by the defendant's counsel, and ruled in.

The presiding judge instructed the jury that as the plaintiffs derived their title to the shore saw of the Washington mill, as appears by the deed they have put into the case, from the defendant, with the right to draw the same quantity of water used by said shore saw at the date of the grant, together with a lath machine, and additional water for an edging machine; the defendant had no right to make or authorize his tenant to make, any change in his mill whereby additional water would be drawn to the detriment of the mill he had conveyed to the plaintiffs. And if the jury found the changes made in the Madison mill authorized by the defendant, contributed to lessen the quantity of water running to the plaintiff's mill purchased of the defendant, at the date of their purchase, whereby any damage was sustained by them, the defendant would be liable for such damage in such action. And also instructed the jury that if the defendant commanded or authorized his tenant, Tinker, to do the blasting and digging which it is alleged diverts the water from the plaintiffs' shore saw mill, or ratified and approved of such acts after they were done, and they did, in fact, divert the water and occasion a damage to the plaintiffs' said mill, he would be liable for such damage; but if he had no knowledge of such acts, and did not command or authorize them, nor ratify

or adopt them, and had no actual knowledge of them, he would not be liable for this injury, nor would Lowell's power of attorney, put into the case, nor his general agency in relation to the defendant's mill property, if the jury are satisfied that such general agency is proved, authorize Mr. Lowell to dig or excavate the bed of the river so as to divert the water, nor authorize him to bind the defendant by giving Tinker liberty to do so. And that the permission by Lowell to dig and excavate, if they find there was any such permission, and the receipt of rent for the mill, by the defendant after the blasting and digging, and the re-letting one of the saws in the Madison mill to Tinker, by Lowell, after the blasting and digging, and the receipt of rent therefor by the defendant, would have no tendency to prove such actual knowledge on the part of the defendant, as was necessary, in order to render him liable, either for the original blasting and digging by Tinker, or for the continuance of the injury, if there was an injury done by him, and put to the jury the following questions:

1. Did the defendant authorize or ratify the digging and blasting and deepening of the channel done by Ferdinand Tinker?

2. What amount of damage was done to the plaintiffs' shore saw mill, by reason of the digging and blasting of the rocks, and deepening the channel by said Tinker?

And directed the jury if they should find for the plaintiffs, to find only such damages as the plaintiffs had suffered from the increased draft of water in the Madison mill, by change of the machinery made by Tinker, unless the defendant commanded and authorized the said blasting and digging, or ratified or approved it, or had actual knowledge of it.

The jury found a verdict for the plaintiffs, and assessed damages at two hundred and twenty-five dollars, and answered the first question in the negative; and in answer to the second question said, seven hundred dollars to the date of the writ.

Harvey and *Pike*, counsel for the plaintiffs.

Downs & Cooper, and *Granger*, counsel for the defendant.

TENNEY, C. J. This suit was instituted to recover damage alleged to have been caused to the plaintiffs' mill, called the shore saw of the Washington, situate on the Schoodic river in the town of Calais, by the defendant, in altering and enlarging the water gates in and under a certain other mill, called the Madison, situate on the same river and upon the same dam, and in opening and keeping open the same gates and conduits, and passage-ways leading therefrom, without lawful authority.

The plaintiffs, as evidence of their title to the premises alleged to have been injured by the acts of the defendant, introduced a deed from the defendant to them, of the shore saw of the Washington mill, dated June 9, 1851, specifying the estate, including the water power and privileges, intended to be conveyed, with the right of making certain alterations in the gear and machinery in the said mill. They also introduced a deed from John McAdam to them, dated September 13, 1843, of the stream saw of the same mill, with certain real estate and privileges.

The defendant introduced in evidence a power of attorney from himself to Levi L. Lowell, authorizing him to give leases of any real estate owned by the defendant in the county of Washington, dated February 28, 1833, and a lease of the shore saw of the Madison mill, to Ferdinand Tinker, executed in the name of the defendant, by his said attorney, dated January 1, 1852, for the term of five years, with an agreement upon the back thereof to extend the same after the determination of the lease, if thereto requested by the lessee.

Evidence was introduced upon both sides touching the injury to the plaintiffs, alleged in the writ; and the jury returned a verdict for the plaintiffs for the damages occasioned by the enlarging of the gates, &c., in the Madison mill, under certain rulings, instructions and refusals to instruct. The defendant filed a motion to set aside the ver-

dict, as being against the evidence in the case; and it was agreed by the parties, that if upon the whole evidence, the action is not maintainable; or if the rulings, instructions, and refusals to instruct were erroneous, to the prejudice of the defendant, the verdict is to be set aside, &c.; otherwise the verdict is to stand, unless the defendant's motion shall prevail.

Some of the instructions requested in behalf of the defendant, and not given, do not seem to be relied upon in the argument, and they will be noticed only by the remark, that their refusal is not regarded as erroneous.

One of the instructions requested by the defendant's counsel, and refused, was, that this action cannot be maintained, provided the jury are satisfied that the plaintiffs, by their acts, or the acts of their agents or servants, or persons in their employment, contributed in any degree towards the injury they allege in their declaration, they have sustained. In support of this proposition it was insisted for the defendant, that after certain alterations in the wheels and machinery in the plaintiffs' mill, more water was required for their operation than was previously necessary. Whether it was so or not, was a question in dispute, and upon the hypothesis that the jury found the affirmative, is it true in law, that if this change added to the injury of the plaintiffs *in any degree*, the defendant could increase the size of his gates and conduits to an extent which might be ruinous to the plaintiffs, with impunity? It is true, that the plaintiffs cannot recover for a loss which they have sustained by an alteration caused by them, which requires more water to propel their machinery than was previously found necessary. But if it is shown to the satisfaction of a jury that the defendant has, without right, diminished the power of the plaintiffs' mill, so as to prevent it from doing the business which it had capacity for doing, without this unlawful interference, it cannot be doubted that he must answer in damages. And the court cannot assume that in such a case it is impossible for the jury to determine under evidence adduced, the amount of

injury sustained by the plaintiffs, by the unauthorized changes made by the defendant. A jury may not be able to draw the line with the greatest accuracy, so that they can know what loss the plaintiffs have sustained by their own alterations, and those of the defendant. But still they may be able to find, that the changes made by the latter have been certainly productive of a certain loss, at least to the former, and for the amount of that loss they may properly return a verdict.

The cases cited by the defendant, upon this point, are those where accidents had happened by collision of vessels upon the sea, or carriages upon the highways, caused by the parties in litigation, when both were guilty of negligence. The case before us has little or no analogy to those referred to. The plaintiffs had certain rights to the water, under the deed from the defendant, and if his acts deprived them of the benefits to which they were entitled by that deed, he cannot justify or excuse his wrongful acts, so far as they have produced damage, by showing that the plaintiffs have caused a loss to themselves, by changes in their wheels and machinery, entirely independent of those acts of his.

The judge instructed the jury, that as the plaintiffs derived their title to the shore saw of the Washington mill, from the defendant, with the right to draw the same quantity of water used by said shore saw, at the date of the grant, together with a lath machine, and additional water for an edging machine, the defendant had no right to make, or authorize his tenant to make, any change in his mill, whereby additional water would be drawn to the detriment of the mill he had conveyed to the plaintiffs; and if the jury should find the changes made in the Madison mill, authorized by the defendant, contributed to lessen the quantity of water running to the plaintiffs' mill, purchased of the defendant, at the date of their purchase, whereby any damage was sustained by them, the defendant would be liable for such damage in such action. In some respects these instructions were the converse of those requested by the defendant, and refused, and the

reasons for their refusal will equally support those which were given. The latter were clear and simple, and could not have been misunderstood, however complex and involved the evidence to which they were to be applied. It is so obvious, that they were correct as abstract rules of law, that their propriety cannot be rendered more clear by argument.

The judge was requested to instruct the jury, that if they believed all the evidence of the case, the defendant is not liable. This was not given. The instructions upon this branch of the case were correct, and those requested were given, or properly withheld, before the one now in question was refused. This having been done, it was no part of the judge's duty to pass upon the evidence and pronounce its insufficiency. If the plaintiffs had introduced no evidence tending to maintain the issue on their part, the judge could have directed a nonsuit, but no exceptions lie to his omission to do this. The request was in effect to do the same, after all the evidence on both sides was before the jury.

The evidence at the trial consisted of deeds and other documents, together with the testimony of numerous witnesses on the stand and in depositions. This testimony, in some respects, was opinions of those experienced in matters appertaining to the questions in controversy. These opinions were not in perfect harmony one with another. The jury passed upon the facts before them, and nothing is perceived in the report of the case, indicating a misapprehension of the evidence by them, or that they were under improper influences. The motion cannot be sustained.

It is alleged in the writ, that the defendant dug up and removed the rocks and earth from the natural bed of the Schoodic river, to a great depth, and by digging up and removing the bank and bed of the river as aforesaid, and by using the new and enlarged water gates as aforesaid, did divert the water of the river from the usual and natural course, &c., to the great nuisance and damage of the plaintiffs.

The jury were instructed upon this part of the case, that if the defendant commanded or authorized his tenant, Tink-

er, to do the blasting and digging, which it is alleged diverts the water from the plaintiffs' shore saw mill, or ratified and approved of such acts, after they were done, and they did in fact divert the water, and occasion a damage to the plaintiffs' said mill, he would be liable for such damage; but if he had no knowledge of such acts, and did not command or authorize them, nor ratify or adopt them, and had no actual knowledge of them, he would not be liable for this injury; nor could Lowell's power of attorney, put into the case, nor his general agency in relation to the defendant's mill property, if the jury are satisfied that such general agency is proved, authorize Lowell to dig or excavate the bed of the river, so as to divert the water, nor authorize him to bind the defendant, by giving Tinker liberty to do so.

Special inquiries were put to the jury: First, did the defendant authorize or ratify the digging and blasting and deepening of the channel done by Ferdinand Tinker; and, second, what amount of damage was done to the shore saw mill of the plaintiffs, by reason of the digging and blasting of the rocks and deepening of the channel by Ferdinand Tinker? To the first question, the jury answered in the negative; and to the second, the sum of seven hundred dollars, to the date of the writ.

The parties agreed, that the whole verdict is to be copied as part of the case, including the special findings in answer to the questions proposed, and if the verdict for the plaintiffs is not set aside, on account of errors of the judge, or under the motion, judgment is to be entered according to the legal rights of the parties. From this we understand that the whole evidence is submitted to the court, and if from that, it is satisfied that the defendant is answerable for the excavations made in the bed of the river, the damage found for that cause is to be added to the verdict returned, and judgment to be rendered thereon.

The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind or a particular place, will bind his principal, so long as he

keeps within the scope of his authority, though he may act contrary to his private instructions; and the rule is necessary to prevent fraud, and encourage confidence in dealing. 2 Kent's Com., 5th edition, 620; *Lobdell* v. *Bahn*, 1 Met. R., 202; Story on Agency, s. 126, and note (1).

"The principal is held liable to third persons, in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances and omissions of duty in his agent, *in the course of his employment*, although the principal did not authorize, justify, or participate in, or indeed know of such misconduct; or even if he forbade them or disapproved of them." "In every such case, the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters of his agency." Story's Agency, s. 452. And as an illustration of the principle, a carrier will be liable for the negligence of his agent, by which the goods committed to his custody are damaged or lost. Ib., s. 453.

But although the principal is thus liable for torts and negligences of his agent, yet we are to understand the doctrine, with its just limitations, that the tort or negligence occurs *in the course of the agency*. For the principal is not liable for the torts and negligences of his agent in any matter, *beyond the agency*, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit. Ib., s. 466, also s. 455. The principal is not responsible for the injuries done by the person employed by him as an agent, *which he has not ordered and which were not in the course of the duty devolved upon such person*. In all such cases the proper remedy is against the immediate wrong doer, for his own misconduct. Ib., s. 319.

By the common law, "he that receiveth a trespasser, and agreeth to a trespass, after it is done, is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment; for in that case, *Omnis ratihabitio retrotrahitar et mandato as quissarator*." Coke, 4 Inst., 317.

The evidence shows, that in the management of the mill property at Calais, in the building of one of the mills upon the dam, upon which the Washington and the Madison are situated, and in the repairs made upon the defendant's mills from time to time, and the supervision of their operations, and the receipt of rents therefor, in connection with the fact that the defendant had his residence in Boston, and was not personally at Calais for many years in succession, Lowell was at least held out to the world as the defendant's general agent, in the charge of the property aforesaid. But it is manifest that the scope of this agency was limited to the business of keeping the mills in a proper condition, leasing the same, and receiving the rents therefor. It does not appear, that previous to the excavations complained of in this action, he had undertaken to make such an alteration in the bed of the river, as to cause a diversion of the water of the same from the wheels of other mills, to the injury of the owners thereof, or that he had done any unlawful act under his agency, commanded before or ratified after it was done, by the defendant.

It is true, that Lowell is shown by the evidence to have authorized the defendant's lessee, Tinker, to have made alterations in the channel of the river, provided no injury should be done thereby to any one, and when informed by the plaintiffs of the excavations made by Tinker, and when he saw them, he made no objections to the further prosecution of the work. But at that time the lease to Tinker had four years and one half to run, and the lessee was entitled, on request, to have the same extended, and the defendant cannot be affected by these facts.

From a full view of all the evidence in the case, there is nothing showing that these excavations were made for the use and benefit of the defendant, and that they were done by Lowell, or authorized by him, in the execution of his agency, as he was held out by the defendant; and under the special findings of the jury, and the law applicable to the facts,

the defendant cannot be held liable for this portion of the injury alleged by the plaintiffs.

The portion of Sherman's deposition which was objected to, and allowed to be read, appertained entirely to the excavations made by the defendant's lessee in the bed of the river, and as the defendant is not liable therefor, the ruling becomes immaterial. But were it otherwise, the fair interpretation of the language is, the expression of an opinion by the deponent, as an expert, in a matter in which he had experience.

According to the agreement of the parties, judgment must be entered on the verdict.

JOSEPH TUCKER, *in Equity, versus* RUFUS MADDEN.

A Court of Equity has a broader jurisdiction than a Court at Law, and while in one a written instrument duly executed, contains the true agreement of the parties, and furnishes better evidence of their intention than any that can be supplied by parol, the other will open a written contract to let in an equity arising from facts perfectly distinct from the construction of the instrument itself.

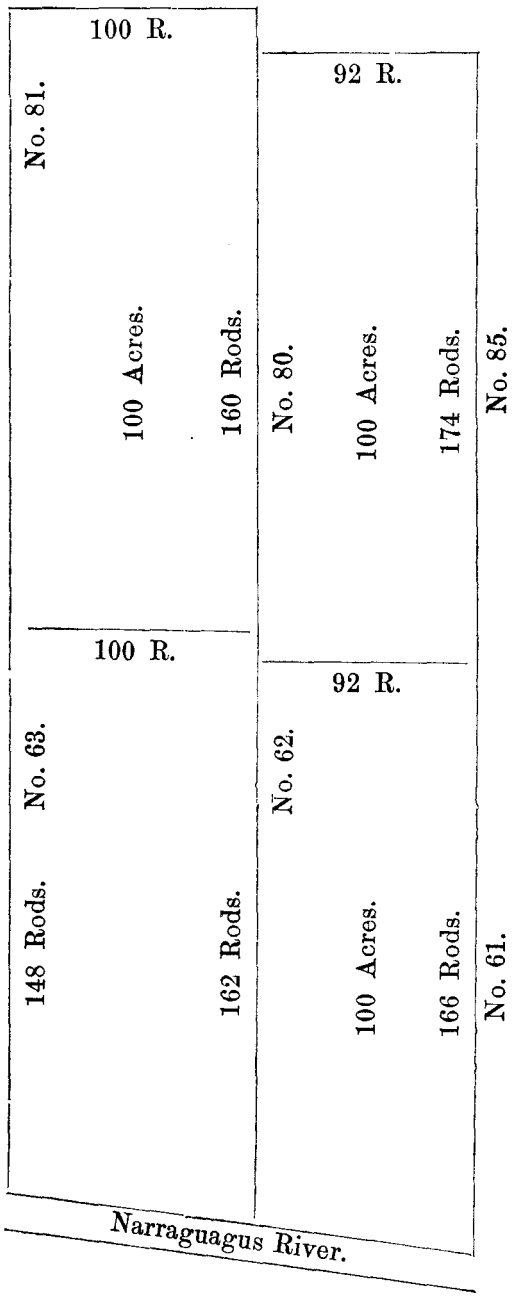
This court has equity jurisdiction in cases of accident and mistake where the parties have not a plain and adequate remedy at law, and this jurisdiction is to be exercised in the same manner as it is exercised by a court having full and general equity powers. Such jurisdiction will be exercised in this state where the evidence of the mistake is plenary, and leaves no doubt in the mind, of its existence.

BILL IN EQUITY, in which Joseph Tucker complains that on the twenty-ninth day of March, A. D. 1836, Gowen W. McKay and George W. McKay conveyed to him a certain lot or parcel of land, situated in Cherryfield, and bounded as follows, viz.: "Beginning on Narraguagus river at low water mark, at the south east corner of a lot of land now owned and occupied by Thomas Small, of said Cherryfield; thence west-

erly by said Small's south line to land owned by William Freeman; *thence south by said Freeman's land to land which was sold to said Freeman and one Israel Dinsmore;* thence easterly by said Freeman and Dinsmore's land to the Narraguagus river, to low water mark, and thence by said river to the place of beginning, containing one hundred acres, more or less."

And the said Tucker further represents that on the sixteenth day of August, A. D. 1836, the above named Israel Dinsmore and William Freeman sold and conveyed to him, said Tucker, a certain other tract or parcel of land, and *being the same referred to as aforesaid, as sold and conveyed by Gowen W. McKay and George W. McKay to the said William Freeman and Israel Dinsmore*, and bounded and described as follows, viz.: "A certain tract or parcel of land situated in Cherryfield aforesaid, containing about one hundred acres, being the same tract or parcel of land which we purchased of Gowen W. McKay and George W. McKay, as their deed to us now on record will more particularly show—it being also a part of the homestead of the late William McKay, deceased." And the said Tucker further says, that the following sketch is a true copy of the two foregoing tracts of land, taken from the original survey of the same by Lathrop Lewis, and which two tracts or two hundred acres constituted the former homestead of the late William McKay, deceased; the lots being numbered thereon, viz.: 62 fronting the river, and 80 lying back therefrom.

Wm. Freeman, Proprietor's Land.



And the said Tucker says that the only part of the homestead or farm aforesaid on which there has been any cultivation made by the said William McKay or his heirs or assignees, is the front lot, No. 62, the remaining or back lot, No. 80, being used for an out-lot, pasture and wood lot; and the said Tucker further says, that about sixteen years ago he sold and conveyed to Rufus Madden, of Cherryfield aforesaid, a portion of the homestead farm, or two hundred acres, described as aforesaid, and bounded as set forth in the deed thereof, as follows, viz.: "A certain lot, piece or parcel of land, situated in said Cherryfield, and containing fifty acres, and bounded on the east by the Narraguagus river, and on the north by the farm on which S. O. Madden now lives. The land which is hereby conveyed is the north half of the McKay farm, so called."

And the said Tucker further declares that the farm mentioned in the above description, and occupied by S. O. Madden, was the southerly part of the two lots, No. 63 and No. 81, marked out in the sketch or copy of the lot made by J. A. Millikin as aforesaid, and that the fifty acres which he sold and conveyed to Rufus Madden as aforesaid, were intended and agreed by him and said Madden to be the northerly *part* of the McKay farm; that is, a part of back lots, viz.: the front and back lot, or lots No. 62 and No. 80, and that after the bargain and sale of said fifty acres to said Madden by him, said Tucker as aforesaid, one James A. Campbell, of Cherryfield, a surveyor of land, was employed by them to survey and run out said fifty acres, according to said bargain and sale, and the said Campbell, in the presence of said Tucker and Madden, did proceed to survey and run out said fifty acres, accordingly, and, in doing so, he begun on the front lot at the river, and run off twenty-three rods, or thereabouts, in width, from the northerly part of said lot, and thence keeping this width, and calculating to run west to the head of the back lot or No. 80, to make out said fifty acres, being one quarter part of the McKay homestead or farm, or of the two lots Nos. 62 and 80, containing two hundred

acres; and the said Tucker declares that the said Madden was therewith and at that time content and satisfied with said running, and continued so for about ten years thereafter, occupying and improving the strip of land of fifty acres so run and designated, and continuing through the whole length of both lots, Nos. 62 and 80, as aforesaid, and never claiming during this time any other quantity or description of land for said fifty acres, but the said Tucker acknowledges that said Madden did, about six years ago, complain that he did not have the full width of the land to which he was entitled, and then claimed two rods more width, or twenty-five instead of twenty-three rods, run to him as aforesaid; and he might have been led to this conclusion from the belief that the lots aforesaid were one hundred rods wide, instead of ninety-two rods, as laid down in the original plan of Lothrop Lewis. And the said Tucker says that said Madden on further inquiry and consideration, became apparently satisfied that he had his full width of land, and continued to occupy it as before, not only the strip of twenty-three rods on the front lot or No. 62, but on the back lot or No. 80, to the head thereof, without complaining, till recently, or within one or two years past, that there was any deficiency or error in said running or width; but the said Tucker now says, that the said Madden, in defiance of all the facts enumerated aforesaid, and of his own acknowledgments thereof, now claims that he is entitled, by his purchase of said Tucker, and the deed from said Tucker to him, to have said fifty acres taken from the front lot or No. 62, and not from any portion of the back lot or No. 80, as aforesaid, and in order to enforce this claim, the said Madden, at the last term of this court, instituted and entered an action against him, said Tucker, wherein he demands of the said Tucker the possession of one half part of the front lot or No. 62, as aforesaid, to make out his said fifty acres, and on the pretended ground, as said Tucker supposes and believes, that the McKay farm, so called, consisted of only one hundred acres, and *that* one hundred acres constituted the front lot or No. 62, as afore-

said, and the said Madden undertakes to sustain this claim or right from the description or recording of said Tucker's deed to him, said Madden, of the fifty acres, as aforesaid, wherein said fifty acres are represented to be "the north *half* part of the McKay farm, so called," and the said Madden contends, that it could not be otherwise, because if the McKay farm, so called, consisted of the two lots, or two hundred acres, as aforesaid, one half or the north *half* thereof would be one hundred acres, or double the quantity of land intended to be conveyed to him, said Madden, by him, said Tucker, as aforesaid. And the said Tucker solemnly declares, that this claim for one half of the front lot or No. 62, is fraudulent, unjust, and dishonest on the part of said Madden, and is made, as said Tucker believes, for the wicked purpose of depriving or robbing him, said Tucker, of an additional portion, viz.: one quarter part more of the front lot or No. 62, as aforesaid, being by far the most valuable part of the homestead, or McKay farm, so called; and the said Tucker declares that the injustice and dishonesty of this claim can and will be shown by the proof of the facts already alleged, and by the further testimony which can be adduced, that said Madden always, until within a year or two years past, acknowledged and claimed that his land or the line of said fifty acres run to the head of the back lot, or No. 80, as aforesaid, and in pursuance of said claim, the said Madden has ever since the conveyance to him by said Tucker, continued, as already alleged, to occupy the back strip, as well as the front, by cutting wood thereon, and making other use thereof, and in consequence of his right and claim thereto. And the said Tucker further declares, that the deed which he gave to said Madden, of said fifty acres, was made out by Caleb Burbank, Esq., then of said Cherryfield, and the said Burbank committed a mistake in calling said fifty acres the north *half* of the McKay farm, and that this mistake probably arose from the fact, that he had before him only one of the deeds, mentioned as aforesaid, to said Tucker, conveying the homestead, or the McKay farm, so called, viz.: the deed of Gowen

W. McKay and George W. McKay, conveying one hundred acres, or half of said homestead or farm—a mistake which, under the circumstances, and for the want of due caution, was naturally made.

Now, therefore, that justice may be done in the premises, and that said Tucker may be protected from the fraudulent designs of the said Madden, as aforesaid, the said Tucker prays that, after due notice to him, said Madden, and a hearing and consideration of his answer to this complaint, and the evidence which may be produced to support the same, your Honors would decree such a correction of the mistake herein set forth, as will leave and make the conveyance or deed from said Tucker to said Madden, of the fifty acres, as aforesaid, such as it ought to be, or that you would order and direct, that the said Madden should release and quit claim by deed, duly recorded, so much of said lots No. 62 and 80, or of the homestead, or McKay farm, so called, to him, said Tucker, as will leave to him, said Madden, the fee of fifty acres, to be taken from the north part of said two lots, in a strip of equal width, from the river to the westerly head thereof; or that your Honors would pass such other decree in the premises, for the relief and protection of the said Tucker, as to you shall seem just and proper, and as shall be warranted by the legal principles of equity, or by statute in such case made and provided. And the said Tucker further prays, that you would allow him reasonable damages and costs.

The said Madden admits, in his answer, that the said Gowen W. and George W. McKay conveyed to said Tucker the one hundred acres described in said bill, on the 29th day of March, 1836, as therein alleged.

Of the conveyance from William Freeman and Israel Dinsmore, alleged in said bill to have been made to said Tucker, August 16, 1836, the said Madden, though he has caused diligent search to be made in the registry of said county, has found no record, and believes that such deed is not recorded, and he has no knowledge that such conveyance ever took

place, but, if any such deed was ever given, he believes that it was not executed August 16, 1836, but prior to said deed from Gowen W. and George W. McKay to said Tucker, and his reason for so believing is, that the buildings were situated on said lot, said to be conveyed by Freeman and Dinsmore to said Tucker, and because he has been informed by said Tucker himself, that he bought said lot of Freeman and Dinsmore before he bought the rest of the lot of said McKays; that the sketch in said bill is a fair general representation of the lots of land recited in the deeds referred to, but denies that it presents a fair proportion of the quantities, breadth, length, or exact courses of said lots, but assents that lot No. 62 lies front of and within the same site lines of lot No. 80. He denies that lot No. 80 constituted any part of the homestead of the late William McKay, or was ever called or considered a part of the McKay farm, or homestead.

The respondent admits that William McKay never made any cultivation of lot No. 80, and says in fact that he never owned it, but that it belonged to one John Bracey, who was sentenced to the state prison in Thomaston, and with his family abandoned the occupancy of said lot, and that if said William McKay ever occupied said lot as an out-lot, wood lot or pasture, he did it as a trespasser. He admits that Joseph Tucker conveyed to him, November 24, 1840, "the north half part of the McKay farm, so called," containing fifty acres, and claims to hold the same, and that said lot conveyed is the north half of lot No. 62, and annexes to his answer a copy of said deed under which he claims; that the farm on which S. O. Madden lived, which is the north boundary of his own lot, was the southerly part of lots No. 63 and 81 upon said plan, and also that the fifty acres, which said Tucker conveyed to him, were intended and agreed to be the north half part of the McKay farm, as mentioned in his deed, but he wholly denies that it was intended by him or agreed by him to purchase any part of the back lot or lot No. 80.

William Freeman, solicitor for the complainant.

George F. Talbot, solicitor for the respondent.

TENNEY, C. J. On November 24, 1840, the plaintiff conveyed to the defendant, by deed of that date, a parcel of land situated in the town of Cherryfield, and described as follows: "Containing fifty acres, and bounded on the east by the Narraguagus river, and on the north by the farm on which Stephen O. Madden now lives; the land which is hereby conveyed is the north half part of the McKay farm, so called."

It is stated in the bill, that the fifty acres which the plaintiff sold and conveyed to the defendant by the deed just referred to, were intended and agreed by him and the said Madden, "to be the northerly part of the McKay farm, that is, a part of both lots numbered 62 and 80 on the plan of Lothrop Lewis;" and that after the bargain and sale of the fifty acres, one James A. Campbell, a surveyor of land, was employed by them to survey and run out the said fifty acres, according to said bargain and sale; and that said Campbell, in presence of the plaintiff and defendant, did proceed to survey and run out the said fifty acres accordingly; and in doing so he began on the front lot, at the river, and run off twenty-three rods or thereabouts in width, from the northerly part of said lot, and thence keeping this width, and calculating to run west to the head of the back lot, No. 80 on said plan, to make out said fifty acres, being *one fourth part* of the McKay farm or homestead, and of the two lots numbered 62 and 80, containing two hundred acres; and that the defendant was therewith, and at the time, content, and satisfied with said running, and continued so for about ten years.

And it is further stated in the plaintiff's bill, that Caleb Burbank, who was employed to write the deed before named, *by a mistake*, inserted in the description of the land intended to be conveyed, the words "half part" of the McKay farm, which would embrace one hundred instead of fifty acres. This mistake the plaintiff seeks to have rectified by a decree of this court.

The defendant in his answer, alleges that the fifty acres, which the plaintiff conveyed to him were intended and agreed to be the north half of the McKay farm, as mentioned in his deed, but denies that it was intended and agreed by him to purchase any part of the back lot, or lot No. 80. He also denies that James A. Campbell ever measured off twenty-three rods from the north line of the defendant's lot, and thence run a line so as to embrace a parcel of land of that width, or that he assented to or acquiesced in said running, or employed said Campbell to run the same. He further denies that Burbank made any mistake, such as is alleged in the bill, in writing said deed to him, and he denies all fraud charged in the bill.

It is a well established rule of law in courts of law, that a written instrument, duly executed, contains the true agreement of the parties; and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. But equity has a jurisdiction which is broader, and will open the written contract to let in an equity, arising from facts perfectly distinct from the construction of the instrument itself. "It must be an essential ingredient," says Lord Thurlow, in *Shelburne* v. *Inchiquin*, 1 Bro., ch. 338, "to any relief under this head, that it should be an accident, perfectly distinct from the sense of the instrument."

In *Hinkle* v. *Royal Exchange Insurance Company*, 1 Ves., 319, Lord Chancellor Hardwicke said the court had jurisdiction to relieve in respect to a plain mistake, in contracts in writing, as well as against fraud in contracts. Those who undertake to rectify an instrument in writing, by showing a mistake, undertake a task of great difficulty.

Lord Elden, in his opinion in the case of the *Marquis of Townsend* v. *Stangroom*, 6 Ves., 328, says, "Lord Hardwicke, saying the proof ought to be the strongest possible, leaves a weighty caution to future judges." "In *Lady Shelburne* v. *Lord Inchiquin*, it is clear Lord Thurlow was influenced by this, as the doctrine of the court, saying it was im-

possible to refuse as competent, parol evidence which goes to prove that words taken down in writing were contrary to the concurrent intention of the parties; but he always thought it must be of the highest nature, for he adds, it must be irrefragable evidence." The doctrines expressed in the foregoing citations, and many others, affirming the same principles, are adopted by Chancellor Kent, in the case of *Gillispie* v. *Moore*, 2 John., R., 585.

This court has equity jurisdiction in cases of accident and mistake, where the parties have not a plain and adequate remedy at law. R. S. of 1841, ch. 96, s. 10. So far as the power of the court extends upon this subject, the jurisdiction is to be exercised in the same manner as it is exercised by a court having full and general equity power. Such jurisdiction has often been exercised in this state, in cases where the evidence of the mistake was plenary, and left no doubt in the mind, of its existence, and the jurisdiction in such cases has not been seriously questioned. *Farley*, in equity, v. *Bryant*, 32 Maine R., 474.

In this case the jurisdiction of the court, as a court of equity, over cases of mistake, in matters suitable for its exercise, is not denied; but it is insisted that the plaintiff in the case, as he has presented it, has a plain and adequate remedy at law; and that the bill is so framed, that he cannot, upon the facts alleged, be entitled to the relief sought. If the mistake stated in the bill is clearly shown, it cannot be denied that the plaintiff is without remedy, unless it can be afforded by a court having equity jurisdiction. For it is manifest, from the description in the deed, in which the mistake is alleged to have been made, that the lines, which are to be the boundaries of the fifty acres conveyed absolutely, must depend upon the location of the McKay farm. The bill is not in the accurate and technical form which is desirable, but the question whether there was a material mistake in the deed is substantially presented, so that it cannot be misapprehended.

Among the exhibits is the copy of a deed from Gowen W.

and George W. McKay to Israel Dinsmore and William Freeman, dated May 25, 1835, and recorded May 28, 1835, which gives the boundaries of the land conveyed, and then follows, "hereby meaning and intending to convey the south half of the farm, whereon we now live, together with one half of the Bracey lot, so called."

On March 16, 1836, Dinsmore and Freeman conveyed to the plaintiff a parcel of land, "being the same tract of land which we purchased of Gowen W. McKay and George W. McKay, as their deed to us, now on record, will more particularly show, it being also a part of the homestead of the late William McKay, deceased." The deed last referred to was to be valid, according to its terms, on the condition that the grantee should pay to the grantors the sum of seven hundred and fourteen dollars and forty-seven cents. Whether this condition was fulfilled or not, is not shown.

No question is made by the parties, as to the east line of the lot in question, it being the Narraguagus river, and the southern boundary of Stephen O. Madden's land, which is the northern boundary of the land conveyed to the defendant by the plaintiff, is also well understood. The lot, which was first occupied by William McKay as his farm, is admitted to be lot No. 62, fronting on the river, and the Bracey lot is directly in the rear thereof, and is No. 80. This was occupied by one Bracey, for a space of twelve or fifteen years; he lived upon it, and had a small field thereon. After Bracey left, he being sentenced to the state prison, which is represented as being thirty years ago, or more, William McKay said he bought that lot; he, however, did not occupy, further than to allow his cattle to run thereon, not having fenced it, or made any improvement upon it, but it appears that he sometimes took wood therefrom.

If it was intended by the parties to this suit, at the time of the conveyance of the lot in controversy, to convey fifty acres exclusively from lot No. 62, or the front lot, as *from the McKay farm*, the language of the deed is in accordance with that intention. If, on the other hand, it is shown by

"irrefragable proof," that they intended that the fifty acres should be taken as described in the deed, *from the McKay farm, composed of the two lots, No.* 62 *and No.* 80, being the original McKay lot, and the Bracey lot, it is equally manifest that the words "half part" of the McKay farm, did not express their design. Hence the question for the determination of the court is, whether it has been shown to its entire satisfaction, that the McKay farm was that constituted by the two lots.

In the deed from Gowen W. and George W. McKay to Dinsmore and Freeman, of May 25, 1835, the Bracey lot is not represented as a part of the farm where the grantors then lived, but as a distinct parcel of land.

The deed from Dinsmore and Freeman of March 16, 1836, to the plaintiff, refers to the deed from Gowen W. and George W. McKay to them, which is represented as being on record, for a description of the land; and the description in the deed thus referred to is a part of the description in the deed making the reference. *Marr* v. *Hobson*, 22 Maine R., 321. And although the deed from Dinsmore and Freeman to the plaintiff contains the words, "it being a part of the homestead of William McKay," yet the reference to the former deed, in which the Bracey lot is not represented as a part of the lot on which the grantors lived, will render these words of little importance, especially as the portion of the land described in those two deeds, exclusive of the Bracey lot, is not that from which the fifty acres conveyed by the plaintiff to the defendant is to be taken, on any construction. From these deeds, no light important to the plaintiff can be obtained.

It appears by the bill, answer and proof, that the defendant has not occupied the southern portion of the fifty acres, as he now claims them. Ordinarily such fact would be very important for a party standing in the position of the plaintiff, as indicating an opinion in the one opposing his claim, that he had no title to the part which he did not take into his possession. And in this case, the evidence is full and un-

contradicted, that the defendant, in his acts, acquiesced in the construction which the plaintiff puts upon the deed, so far as it regards a considerable portion of the land in dispute. And those acts were of such a description, as to satisfy the mind of one seeing those acts alone, that the present claim of the defendant is unfounded. But it is shown by the part of the answer which is responsive to the bill, that a dispute touching the boundary of the lot, upon the south, arose soon after the conveyance, and that the defendant was induced to believe that the land was actually described as being part of the two lots, when, as he alleges, by the contract, as made before the execution of the deed, the whole fifty acres should be taken from the front lot; that he made attempts to obtain satisfaction for his loss, arising from what he treats as an imposition on the part of the plaintiff, but not succeeding in obtaining counsel willing to prosecute his claim, he, for a long time, submitted to the loss, under what he considers now as an erroneous opinion of the true construction of the deed. This explanation, accompanied with the defendant's allegations and denials in the answer, certainly tend somewhat strongly to show that a mistake was not made in the deed.

The testimony of persons living for a long time in the vicinity of the land, as to what constituted the McKay farm, is not in harmony one part with the other, but when all is examined in connection, it affords but little aid of itself.

The evidence derived from James A. Campbell and Salim P. Jordan does not fully support the allegations in the bill, touching the running out of the land, after the conveyance. It shows an acquiesence on the part of the defendant, in the limits contended for by the plaintiff, and unexplained would be important for the plaintiff. But with the explanations in the answer, which is responsive to the bill, its force is much qualified.

In consideration of all which appears in the bill, answer and proofs, we are not satisfied that the mistake stated in the bill as having been made in the deed from the plaintiff to

the defendant, has been so clearly shown as to authorize the reformation in the deed prayed for in the bill.

Bill dismissed, with costs for the defendant.

WILLIAM WRIGHT *versus* HENRY EASTMAN.

Where one co-partner furnishes another funds, which it was the duty of the other to furnish as a part of the capital stock, he may recover the same in an action of assumpsit, before the final settlement of the co-partnership business.

For a final balance, assumpsit may be maintained after the whole business of the co-partnership has been settled, and not before.

Where there was no money originally paid by either party to a co-partnership, but the capital stock consisted of accommodation paper, originally between the parties, but subsequently renewed and kept alive by the credit of another house, and it did not appear distinctly by whom it was ultimately paid, it is too remote from the original transaction, even if paid by the plaintiff, to authorize him to maintain assumpsit as for money advanced beyond his proportion of the co-partnership stock.

REPORTED by HATHAWAY, J., presiding at *Nisi Prius*.

This was an action for money had and received and money paid and goods furnished. The plea was the general issue, with an account in offset, and brief statement alleging partnership between the plaintiff and defendant.

To sustain his action the plaintiff introduced several drafts drawn by the defendant upon him, and paid by the plaintiff at maturity.

The plaintiff also introduced an agreement of Henry Eastman, dated December 20, 1851, as follows:

BOSTON, December 20, 1851.

In consideration of advances made by William Wright, by his acceptances and payment of numerous drafts, drawn by me on said Wright, to enable me to raise means to build the bark Fanny, and for other purposes, I agree, on settlement of accounts between him and me, to allow him, in addi-

tion to the sum of said drafts, regular interest, such further interest as shall be just and equitable as a compensation for the extra interest he shall pay for money on account of my delinquency in furnishing funds to meet said drafts and liabilities, as I originally intended to have done.

HENRY EASTMAN.

Witness: *Charles L. Wright.*

The defendant introduced a contract between the plaintiff and the defendant, dated May 4, 1850, to wit:

BOSTON, May 4, 1850.

Memorandum of agreement between William Wright, of Boston, and Henry Eastman, of St. Stephen, as follows:

Whereas the said Wright has, in a written contract made this day, with one Michever, of Eastport, to purchase of him a certain steamboat called the Samuel B. Wheeler:

Whereas, the said contract provides for the delivery of said boat to said Eastman, in manner therein set forth, and for the payment thereof in said Eastman's drafts on said Wright, payable in four, eight and twelve months, and

Whereas, it is understood that said purchase is made on joint account of said Wright & Eastman, therefore, it is agreed by them, that each will furnish his equal proportion of the necessary means to meet the payment of said drafts, at maturity. And it is further understood, that said Eastman will proceed immediately to construct a vessel, of such dimensions and of such materials as he shall think best, for the purpose of taking and transporting said steamboat to California, there to be disposed of as may hereafter be decided upon, and all expenses and outlays for the construction of said vessel, and the transportation of said steamboat and other property to California, as above, shall be equally borne by said Wright & Eastman, and all the avails of the enterprise, whether from a sale of the property or otherwise, shall be equally divided between them.

[Signed] WILLIAM WRIGHT,
HENRY EASTMAN.

The plaintiff testified as follows: Eastman, the defendant, applied to me personally, in April, 1850, to go into this transaction. He bargained for the steamer S. B. Wheeler, and drew on me for it. I paid the drafts when due, as well as the other drafts that have been presented. I do not know what the drafts were used for.

He testified, that at first Eastman drew on Bates & Co., and afterwards he drew himself on Bates & Co., and took up Eastman's drafts. The £200 draft was given to pay for a renewal of the $10,000 acceptance of Bates & Co. I made an arrangement to guaranty the amount of the drafts on Bates & Co. Eastman mortgaged the bark Fanny to Bates & Co. to secure them. This was done with my consent. I desired to have her go into their hands as security for me and them, on Eastman's representations, which were false. He represented to me, and to Bates & Co., that she was worth $35,000. I had not then seen her. She was sold to me by Bates & Co., October 30, 1852. I made no request of sale. I paid $10,000 for her. Bates & Co. insisted on selling her at auction. By request of Bates & Co. and Eastman I bought her for $10,000, and gave Eastman an opportunity to take part if he wished. Bates & Co. had the management of the Fanny after she was put into their hands, and received her earnings after she returned from California.

At the time the agreement was made, in May, 1850, I did not agree to accept any drafts except those for the steamer S. B. Wheeler. Eastman said he had the ability to build the bark, and would do so, and that would about offset the steamer.

He also testified: "I paid the bills mentioned in the schedules;" and the plaintiff further stated that the various drafts mentioned in the schedules, in favor of the parties specified in said schedules, were drawn to pay these bills. He also stated that he paid the insurance specified in those schedules, together with the commissions charged by Bates & Co., who effected insurance at the request of Eastman.

The defendant then introduced a letter of plaintiff, of July 6, 1852, a receipt of plaintiff to defendant, of two drafts on Bates & Co. for $2000 and $2500, dated October 14, 1850; a receipt of plaintiff to defendant, of March 27, 1851, for three notes of $2000 each, on six, seven and eight months; a receipt of plaintiff, dated October 14, 1850, for $1200, and letter of plaintiff to defendant dated September 9, 1850.

Plaintiff then introduced three notes of defendant, specified in receipt of March 27, 1851, and stated that he received the notes for his accommodation; that he had used one of them, and taken it up at maturity as indorser, and the other two notes he had always held, and now offered the three notes to defendant in exchange for the receipt. It is the custom in Boston to charge two and a half per cent. on accommodation acceptances.

The defendant then introduced the accounts of Bates & Co., and the plaintiff testified that the item of credit in their account, of $8300, arose out of the sale of the Fanny; and stated that all the monies he had recived of Bates & Co. he had received on his own guaranty — could not have got it without his guaranty.

He also testified that Eastman had large dealings with Bates & Co. on his own account. A copy of the power of attorney of Eastman to Bates & Co., and also of the mortgage to them by Eastman, was introduced by the plaintiff. He also read in evidence the agreement of Bates & Co. to accept Eastman's draft, dated October 1, 1850, and the plaintiff's guaranty thereon. Also, Bates & Co.'s agreement to sell the Fanny, dated October 30, 1852.

The plaintiff testified, in reply to the defendant's question, that the draft in favor of Sewall Day & Co. was drawn for the rigging of the bark Fanny; that to Wright & Whitman was for duck; to Potter, Leland & Co., for beef and pork; to William Thomas & Co., for yellow metal; James Weld & Co., for ship's stores. The testimony put into the case by the defendant, of transactions subsequent to the date of the plaintiff's writ, was objected to, but admitted on the defend-

ant's stating that it was offered to show the unsettled state of the accounts between the parties, and that the partnership transactions continued long after this suit.

Agreement of October 1, 1850:

Whereas, Bates & Co., of Boston, have granted unto Henry Eastman, of St. Stephen, the letter of credit, a copy of which is hereto annexed, *at my special instance and request, and as well for my benefit and accommodation as for the benefit and accommodation of said Eastman,*

Now, in consideration thereof, and ten dollars to me paid by said Bates & Co., I do hereby promise, undertake and agree, to and with said Bates & Co., that the said Henry Eastman shall well and truly keep and perform all the stipulations, conditions and agreements, specified and contained in the said letter of credit, on his part to be observed, kept and performed, and that I will guaranty to them the faithful performance thereof, and will save harmless and indemnify them for all loss, costs, payments and damages which they may make, sustain or incur by reason of granting said letter of credit, hereby waiving all notice of the acceptance of this guaranty by them, and notice of the delivery or accepting of the drafts therein named, and also notice of any default or failure on the part of the said Henry Eastman.

For all the liabilities on account of, or in any way connected with the bark now building by said Eastman, as also on account of cargo by said bark, I hereby agree to save harmless the said Bates & Co., and to indemnify them from all loss which they may sustain, meaning to be answerable for said Eastman no farther than what relates to said bark and cargo, and drafts drawn as aforesaid, and reserving the right to discontinue and annul this obligation at pleasure as to all prospective engagements and liabilities on the part of said Bates & Co. [Signed] WILLIAM WRIGHT.

F. A. Pike, counsel for the plaintiff.

In May, 1850, the defendant, a merchant residing in St. Stephen, in the Province of New Brunswick, applied to the

plaintiff, a merchant residing in Boston, to go into a venture with him, in sending a steamer to California. After repeated applications, the plaintiff consented, and on May 4th, 1850, entered into the agreement which is presented in this case. In pursuance of that agreement the defendant went on and built a vessel, and fitted her out, and put cargo into her, and in December of the same year she sailed for California, taking in her the steamer "S. B. Wheeler," and also carrying cargo and passengers. The defendant himself went out and took charge of the venture in California, sailing from Boston in January, 1851.

The amount received by the plaintiff as returns from the venture appear fully in the case, but what amount was received by the defendant does not appear, nor does it appear whether the speculation was upon the whole profitable or otherwise, nor is it material. The plaintiff in this case claims, that by the agreement of May 4th, 1850, he was to furnish one half of the original outlay, and that having furnished more than that to the defendant, and by his request, he is entitled to recover back the excess in this action.

Where one party contributes more than his proportion of the capital of the partnership, in order to launch the partnership, he may recover back the excess of his co-partner in an action of assumpsit. *Marshall* v. *Winslow*, 11 Maine R., 61.

Where a contract is preliminary to the partnership, and in contemplation of it, such as a promise to contribute so much to the partnership funds, in stock or money, an action can be maintained without settling up the partnership concerns. Story on Partnership, p. 320, in note; *Williams* v. *Henshaw*, 11 Pick. R., 84; *Paine* v. *Thatcher*, 25 Wendall R., 450.

Considering the law well settled in these and other decisions, I shall examine the facts of this case with reference to it. He paid:

Sewall Day & Co., for cordage,	2169,00
Wright & Whitman, for duck,	1095,27
William Thomas, for yellow metal,	2334,70
	5598,97

There is no reason in law or equity why the plaintiff should not recover the amount which he has furnished for the defendant, unless it is found in the Bates & Co. account. But the Bates & Co. account should not prevent this conclusion, because:

1. Wright actually paid the amounts.

2. It does not appear in the case that Wright received of Bates & Co. anything toward their payments.

3. Because the agreement between Bates & Co. and Wright, and Eastman, is an independent and separate agreement, and must stand on its own footing.

4. Because Wright has actually paid all the advances made by Bates & Co.

1. There is no dispute about this proposition. The evidence is full and uncontradicted.

2. "It does not appear that Wright received anything of Bates & Co. towards these payments."

That he received large sums of Bates & Co. is not denied, but he received no specific sum for a specific purpose. If he took the money he received of Bates & Co., and applied it to another purpose, as he might well enough do, and advanced other money to pay these bills, it would make no difference to Eastman.

Nor does it appear that at any time when he paid a single draft or a single bill, that he had any money in his hands that he had received from Bates & Co. If the defendant would avail himself of this point he should have shown when Wright received the money of Bates & Co, and that he had it in his hands when the amounts were disbursed.

3. The agreement with Bates & Co. is a distinct and independent contract, and must stand on its own footing.

It was an agreement to raise money. Wright raised it on his guaranty, and he says that without his guaranty it could not have been raised. How, then, could Eastman charge Wright with this money, when Wright's own liability was outstanding?

Should Wright pay Eastman this sum, and be liable over

again to Bates & Co.? Eastman had paid Wright no money, nor anybody else any money for Wright, and why, then, should he recover of him?

A simple liability to pay is no ground of action. The farthest the courts have gone is to sustain the consideration of a promissory note, given on account of liability as indorser where the maker was insolvent, and the liability had become fixed.

So far as Bates & Co.'s accounts are concerned, the parties would stand off, were there no further proof in the case than the fact that upon their joint liability, Bates & Co. furnished Wright with money. Each of them were finally liable to Bates & Co. Wright's position, after waiving notice, was the same as that of a joint promissor to Bates & Co.

But if it was otherwise, it would not benefit Eastman. Suppose Eastman lent Wright his notes, and Wright had procured the money on them without indorsing them. Eastman could not have sued Wright on account of them until they matured; until he paid something he could have no right of action.

4. Wright had actually paid all the advances made by Bates & Co. before the date of this writ.

The defendant has put in Bates & Co.'s account, and an examination of it shows that the original draft account stopped January 15, 1851. It had then run to $16,500, and $3,000 for insurance. Those drafts all matured before this action commenced, and were paid by this plaintiff.

The last of the series was for $10,000, and matured September 18, 1851. The insurance matured October 15, 1851. All this is shown by Bates & Co.'s account.

But the defendant says they were paid by other drafts; but what of that? He paid nothing on either, and he has no right to complain. But the whole *modus operandi* of payment is in the case, and without objection on the part of the defendant; and by the agreement the court are to take into consideration all such testimony.

It appears, then, the paper subsequently given by the defendant, was taken up, and the plaintiff's own paper substituted, and that paper has all been paid, and the whole account discharged. So that the money furnished by Bates & Co. to Wright, has all been paid to them by him. An examination of Bates & Co.'s account shows that Eastman has never paid the first dollar of it. There are two credits in it, one of $8382.42, for balance of Eastman's account, and another of $640.78; but these come from the partnership property.

Wright paid Bates & Co. 10,000 for the bark, and then the guaranty account got credit for $1617.58 less. This amount Eastman got the benefit of in his private account with Bates & Co., so that Eastman never paid anything toward the liquidation of this account. Besides, the Fanny ran at a loss after leaving California, and an examination of Bates & Co.'s account shows this further fact: that the amount paid by Bates & Co. for insurance and disbursements on the Fanny, for interest and commissions, exceed the amount they received for the earnings of the Fanny, and the proceeds of the sale of her by $2561.92.

The defendant's counsel may say that there was a loss on the enterprise, but it appears quite clearly that the defendant must have bettered his condition out of the transaction.

He was in California, and had the management of affairs there. The steamer was there, running, more than a year probably, for it does not seem that she was sold until late in 1852, and the plaintiff received but $3200 for her earnings.

There was a cargo of $6953,20 paid for by the plaintiff, for which he never received one cent, and there was $4600 of freight money of the Fanny out to San Francisco, of which the plaintiff received nothing.

All these sums the defendant received, and rendered no account, and gives no account here in this trial.

But the defendant sets up the defence of partnership, and of course it does not lay in his mouth to say that the partnership suffered loss.

The view I have taken is further confirmed by the defendant's agreement of December 20, 1851, to which I would call the especial attention of the court, as in it the defendant states the facts, that the plaintiff had furnished the means to build the Fanny, and for other purposes, and that he himself had not furnished the means he originally intended to have furnished, and agreeing, in consideration of that, to pay a reasonable compensation for extra interest paid on account of his delinquency.

This is an express acknowledgment of an intelligent merchant, and made after the transaction was all completed, so far as advances were concerned, and when he knew just how the thing stood.

The amount of advances made by the plaintiff is not specified, but there is no need of it, as the amounts are all fixed.

It shows clearly that the defendant, at that time, had no idea of charging the plaintiff with the amount received of Bates & Co., on their mutual guaranty.

I have argued the case upon the presumption, that the drafts drawn by the defendant, in the summer of 1850, upon the plaintiff, and paid by him to the amount of $7246,10, were drawn for the purpose of raising money to build and complete the Fanny. Whether they were so drawn or not, does not appear. Wright says he does not know.

The legal presumption would be against the position. Wright's testimony and his letters, and Eastman's, all negative the legal inference that Wright had money of Eastman's in his hands at the time of acceptance.

Eastman's agreement of December 20, 1851, specifies, drafts drawn for the purpose of building the Fanny, "and for other purposes."

Yielding then to the testimony in the case, the plaintiff proves that he was an accommodation accepter for Eastman, to the amount of $7426,10, and crediting Eastman with the $1000, furnished by C. H. Eastman, in his father's absence, and the $1200 paid by the defendant himself in October, 1850; it leaves the sum of $5226,10, for which the defendant

is liable, together with the commissions which Mr. Wright testifies are customary in Boston, and interest. This is undoubtedly the true view of the case. It changes the figures of advances to that extent, but makes no difference in the aggregate amounts, whether it is reckoned separately or as a portion of the advances, as I have already exhibited.

Should the court dissent from the view I have already taken of the transaction, I submit that this one is free from all question of partnership, and in exact accordance with the testimony.

Downes & Cooper, counsel for the defendant.

The defendant contends:

1. That the plaintiff and the defendant were co-partners, and the subject matters of the plaintiff's account and bill of particulars filed in this action, were relative to and embraced partnership transactions, and the accounts of said partnership have never been adjusted or settled between them, and if they were fairly and properly adjusted, the balance would be in favor of said defendant. Therefore the plaintiff's action cannot be sustained. *Chase* v. *Garvin*, 19 Maine R., 211, and cases there cited; *Wilby* v. *Phinney*, 15 Mass. R., 116; *Champion* v. *Bostwick*, 18 Wend. R., 83.

2. That many of the items in the plaintiff's account and bill of particulars accrued, and are dated, after the commencement of the action and after the date of the writ, and therefore cannot be recovered in this action.

3. That the drafts drawn, indorsed or negotiated by the plaintiff were for the partnership business, as were also any advances of money, (if any were made by him,) and therefore the charges of commissions and interest in the plaintiff's account are wrong, and cannot be maintained.

RICE, J. From the evidence in the case, it appears that the parties in May, 1850, entered into an arrangement to procure and send to California a steamboat and vessel, in which she was to be transported, with such cargo and freight as they might deem for their interest to transport for them-

selves or others. The steamboat was purchased by the defendant, and paid for in drafts, drawn by him, on the plaintiff, and by him accepted, payable in four, eight and twelve months. The vessel, called the Fanny, was built by the defendant, and drafts were drawn by him upon the plaintiff, from time to time, to raise funds for her construction. It seems to have been the understanding of the parties, that each was to contribute an equal portion of the funds necessary to pay those drafts, as they should mature, and also pay an equal portion of the expenses of the outfit, and share equally in the proceeds of the adventure. Neither advanced any cash originally, to put the enterprise on foot.

The papers in the case show that as the drafts which were thus drawn came to maturity, neither party was in condition to pay them. The plaintiff became exhausted on the payment of the first draft given for the steamer, being one of those for five thousand dollars, and the defendant seems to have been equally exhausted by investing no larger sum in the construction of the "Fanny."

As their paper was running to maturity it became a serious question how funds were to be raised to pay them as they should fall due, and thus keep the "ship afloat," and prevent a failure of the enterprise. To this end an arrangement appears to have been made by the defendant with Bates & Co., a mercantile firm in Boston, by which he was at liberty to draw on them in favor of the plaintiff, for funds. This arrangement was made, as the plaintiff declares, at his special instance and request, and as well for his benefit and accommodation as for the benefit and accommodation of the defendant. Under this arrangement longer accommodations in the way of credits were obtained from Bates & Co. In this way, the enterprise appears to have been kept afloat, and their payments of the accommodation paper put forward. In the final payments of these acceptances to Bates & Co., as well as in advances for the general enterprise, the plaintiff claims that he is largely in advance, having paid much more

than the defendant, and for this alleged excess he brings this action.

The defendant controverts this position, and alleges that the plaintiff has received from the proceeds of the adventure large sums, which much more than indemnify him for any advances he has made, and that as matter of fact, all the payments he has made, or the larger part of them, at least, have been made from the proceeds of the adventure in which they were jointly interested; that all the claims of the plaintiff upon him grew out of partnership transactions which have not been finally adjusted and settled, and therefore this action cannot be maintained.

An examination of the evidence in the case has satisfied us that the whole enterprise out of which the claims and counter-claims between the parties originated, was a partnership transaction.

It is undoubtedly true that where one co-partner furnishes another funds, which it was the duty of the other to furnish as a part of the capital stock, with which to set on foot or launch the co-partnership, such funds thus furnished may be recovered in an action of assumpsit, without waiting for a final adjustment of the business of the copartnership. *Marshall* v. *Winslow*, 11 Maine R., 58. So, too, assumpsit may be maintained by a co-partner for a final balance due him after the business of the partnership has been *finally settled*, but not before. *Williams* v. *Henshaw*, 11 Pick. R., 79.

It is not suggested that all the business of the partnership, in this case, has been settled. The action cannot be maintained, then, as for a final balance due the plaintiff.

The evidence shows that there was no money originally paid into the concern by either party. The capital stock consisted in accommodation paper, principally, if not wholly. This paper, which was originally between the parties, was subsequently renewed and kept alive by the credit of Bates & Co. From what funds Bates & Co. were ultimately paid, does not distinctly appear; the whole matter is very much

complicated. But however that may be, even if paid by the plaintiff, as he contends it ultimately was, it was too remote from the original transaction, and too much involved in the subsequent business of the co-partnership to authorize the plaintiff to maintain assumpsit as for money advanced beyond his proportion, for the defendant, to set the partnership on foot. No judgment that could be rendered in this case would settle the matters in controversy between the parties, but would rather tend to involve them in deeper complication and confusion. A process in equity would seem to be an appropriate remedy for the plaintiff.

Plaintiff nonsuit.

THOMAS HOWE *versus* BENJAMIN W. FARRAR.

To maintain trespass, the plaintiff must show that he has actual or constructive possession of the property sued for, and the defendant is not put to his justification until the fact of possession is established by the plaintiff.

One who relies wholly upon constructive possession arising by implication of law, from the alleged fact that the legal title is in him, must first establish his title, or he is left without possession and without any basis on which to maintain an action of trespass.

When, to prove his title, the plaintiff introduced a mortgage from F. to himself, and the defendant replies that he obtained no title, and consequently no constructive possession by that mortgage, because F. had none at the time, having previously divested himself of the title to the property by mortgage to B., the latter mortgage is admissible as evidence tending to show that fact.

EXCEPTIONS to the rulings of DAVIS, J., presiding at *Nisi Prius.*

This was an ACTION OF TRESPSS for the alleged taking and conversion of two horses and two harnesses by one Charles Perkins, in the capacity of a deputy of the defendant, who was sheriff of the County of Washington, in attaching said

property on a writ in favor of Thomas Sawyer, of Calais, against Samuel J. Foster, of Weston. The writ is dated August 18, 1856. The general issue was pleaded and joined, and a brief statement by the defendant, justifying as an officer, and setting forth several grounds of objection to the validity of the title asserted by the plaintiff.

The plaintiff claimed title to the property sued for, by virtue of three several mortgages purporting to have been executed by Samuel J. Foster, of Weston, to him, the validity of which was contested, on several grounds set forth in the defendant's brief statement, which will be understood from the instructions given or requested to be given, by the presiding justice. In the trial, the defendant offered to read the mortgage of S. J. Foster to B. F. Brown, to show the conduct of Foster, in connection with other evidence in the case, from which fraud might be inferred between the parties to the mortgage under which the plaintiff claims, and also to show that the same horse claimed by the plaintiff under his mortgage was included in this mortgage offered by the defendant. This evidence was objected to by the plaintiff's counsel as irrelevant, and it was excluded on that ground. The defendant also offered in evidence the mortgage of Foster to Thomas Gilpatrick, from which, in connection with the other evidence in the case to authorize the jury to infer fraud. This being objected to by the plaintiff's counsel, was ruled out on the ground of irrelevancy. The defendant also offered to show that Samuel J. Foster directly or indirectly purchased at the sheriff's sale most of the property attached on the writ against said Foster in favor of said Sawyer, and left in Foster's possession, who still has the most of it, amounting to about $4000 in value, which was also objected to, and ruled out as irrelevant.

The presiding judge was requested by the defendant's attorney to instruct the jury:

1. That if the mortgages under which plaintiff claims the horses and harnesses sued for in this action were not delivered to him prior to their attachment by the defendant's

deputy, Charles Perkins, the claims of the plaintiff under such mortgages cannot be sustained. This was given.

2. That the plaintiff's claim under these mortgages cannot be sustained against the defendant, unless the property was delivered to or taken possession of by the plaintiff prior to the attachment by the defendant's said deputy. This was refused, and the judge instructed the jury on this point, that if, in accordance with a previous understanding between Foster and Howe, testified to by Foster, that Foster should give to Howe from time to time mortgages on all the property Foster should accumulate to secure Howe for advances to him, Foster executed and carried these mortgages, under which the plaintiff claims the property sued for, to the town clerk, and had them recorded, that would, in law, be a sufficient delivery. After that Foster could not cancel the mortgages without consent of Howe, and if there was no further delivery that would be sufficient.

3. That a formal or symbolical delivery of the property by the mortgager to the mortgagee, or to some one in his behalf, was essential to the validity of the mortgages as against the attachment made by the defendant's deputy. The judge declined to give this instruction, and instructed the jury that the mortgaged property, if mortgaged to secure a debt exceeding the sum of thirty dollars, need not be delivered, if recorded by the town clerk in the town where the mortgager resides. And though it has been contended and argued by the defendant's counsel, that where the mortgagee lives out of the state, where it would be difficult, and sometimes, perhaps, even impossible, for creditors to avail themselves of the statute provision requiring the mortgagee of personal property to give a correct statement within a limited time after demand by any person desiring to attach the mortgagee's interest of the amount of his claim on the mortgaged property, to enable the creditor to tender the amount of such claim, and attach the property, and hold it, yet this does not change the right of the mortgagee. He has the same right as though he resided in this state. This

statute was designed for the benefit of creditors, but in providing for their security it was not designed to impair the rights of the mortgagee in respect to the validity of the mortgage.

4. That said mortgages were void in law, from what appears on their face. This request was refused, and the judge instructed the jury that the mortgages, if duly executed and recorded, were *prima facie* sufficient to pass the property, shifting the burthen of proof to the defendant, to impeach them, and to show their invalidity.

5. That if said Foster, in giving said mortgages, had any fraudulent intention of covering up the property from his creditors, or of deterring other creditors from attaching it, concurred in by the plaintiff, they were void as against the said attachment. Upon this the judge instructed the jury, that mortgages were valid, unless they were executed with the intention, at the time of their execution, on the part of both Howe and Foster, to defraud or delay creditors, and that they must be satisfied that these particular mortgages, one or more of them under which the plaintiff claims the property in question in this action, were thus made in fraud of the creditors of Foster, to render them invalid; that if the evidence should satisfy them that the other mortgages were fraudulent, that is not enough, unless they should also be satisfied that these particular mortgages were so.

6. That if any part of the purpose of said mortgages by the parties was to deter the creditors of Foster from attaching the property, and to protect it for the benefit of said Foster, so that he might use and enjoy it, they were fraudulent and void, as against the attachment. This was substantially given, confining it to the time the mortgages were made.

7. That if plaintiff knowingly permitted said Foster to sell and dispose of, and appropriate to his own use, for his own support or benefit, the proceeds of a considerable part of the property covered by each of said mortgages, or any of them, without paying to said Howe the value of such property,

such mortgage or mortgages are invalid against said attachment. The judge instructed the jury that such facts would be evidence from which they might infer fraud; that they might consider whether such proceedings were consistent or not consistent with the usual manner in which honest men would conduct with property which they had *bona fide* taken a mortgage on for security, and the jury will judge whether it is the usual mode of honest men to take security on property and then allow the debtor mortgagee to consume it.

8. That if the plaintiff permitted said Foster to retain the possession of the property claimed by him under the mortgage of June 26, 1850, an unreasonable length of time, using it as his own, it was invalid against said attachment, and that from June 26, 1850, to November 24, 1855, was an unreasonable length of time for such possession under that mortgage..

9. Same as to the mortgage of December 1, 1853.

10. Same as to the mortgage of January 1, 1853. Touching the three last named requests the judge instructed the jury that the length of time which the mortgagee permitted the mortgager to remain in possession of the property might be so great as to authorize the jury to infer fraud from it, and they would judge whether the length of time Foster was allowed to have the possession of the property included in these mortgages, one being over five years, one nearly three years, and the other over two years, without any demand on the part of Howe, are not circumstances inconsistent with honest intentions, from which they may infer fraud.

11. That the jury, in determining the question of the validity of the mortgages under which the plaintiff claims, are at liberty to look to and take into consideration the evidence adduced tending to show the situation and circumstances of the parties, and their conduct touching the mortgaged property, and if the jury find any of it, which, from its nature and the circumstances attending it, the jury are satisfied could not have been, and was not, intended for security, the

mortgages covering such property would be invalid against attaching creditors.

This was substantially given, with the additional remark, that such would be the law only in case Howe is found to have intended to aid Foster in covering up such property, to hinder, delay, or defeat creditors. And further instructed them, that a mortgagee might sell, exchange, and dispose of and consume, the property mortgaged with honest intentions, if he substituted other property of equal value and made a new mortgage of such property to the mortgagee, to secure the same debt. And such a transaction would not necessarily be fraudulent as to other creditors. The presiding judge was also requested to instruct the jury, that if they found that Foster had been doing business under the firm of Samuel J. Foster & Co., and his goods purchased, invoiced, marked and forwarded in that name, and made mortgages to the plaintiff in that firm name, when, in fact, he had no partner, and this was known to the plaintiff, this would authorize the jury to infer fraud in the making of these mortgages, and a knowledge and acquaintance in it on the part of Howe. The judge declined to give this instruction, and instructed the jury that it was very common for a person to do business in the name of a firm, when no partnership existed, and no inference of any fraudulent intent could be drawn from such facts, in regard to the mortgages under which the plaintiff claims. With regard to the form of the action, the judge instructed the jury that there was no legal objection to the form of the action.

The verdict was for the plaintiff, and the defendant excepted.

George W. Dyer and *J. Granger*, counsel for the defendant.

The presiding judge erred, in excluding the mortgage from S. J. Foster to Benjamin F. Brown. This mortgage was executed, recorded and delivered. It was to secure the performance of a bond to pay the debts of the late firm of B. F.

Brown & Co., composed of B. F. Brown and said Foster. It probably embraced all the personal property Foster had at that time, which was probably worth $3000. Included in this mortgage is much of the same property mortgaged to the plaintiff June 26, 1850, and especially the mare *Jessie* bought of Whitney, sued for in this action.

If that was a valid mortgage, the legal title to the horse Jessie was in Brown, and this action is not maintainable to recover its value. *Rugg* v. *Barnes*, 2 Cush. R., 391; *Smith* v. *Smith*, 11 Shep. R., 555.

As the property was not taken from the plaintiff's possession he can recover only on the strength of his own title. Any evidence, therefore, tending to show that the legal title to the property was not in him was competent. The mortgage itself, duly executed, delivered and recorded, was *prima facie* sufficient to establish that fact. *Davis* v. *Hill*, 18 Pick. R., 394; *Brinley* v. *Spring*, 7 Greenl. R., 241, 254. If Brown's mortgage was valid, he has a right of action against the defendant for the horse Jessie.

The mortgage from Foster to Gilpatrick was admissible as affecting the same pretended arrangement, showing that Foster continued to control and dispose of his property to suit his convenience, and without any objection on the part of the plaintiff.

The proof offered of Foster's purchasing the property, held in Mr. Sawyer's writ and execution, to the value of $4000, and Foster's retaining it in his possession, had a tendency to show Foster's fraudulent conduct towards his creditors, and his determination to keep the possession of this property at all events.

The instruction given under the first request, as to the delivery of the mortgages under which the plaintiff claims, were erroneous. Making them and procuring them to be recorded did not constitute a delivery, so as to make them effectual as a valid contract. The acceptance on the part of Howe, or his express assent to them prior to the attachment, was indispensably necessary. *Jewett* v. *Preston*, 14 Shep. R.,

400; *Maynard* v. *Maynard*, 10 Mass. R., 456; *Dole* v. *Badman*, 3 Met. R., 139, 142; *Sampson* v. *Thornton*, 3 Met. R., 275, 281; *Travis* v. *Bishop*, 13 Met. R., 304; *Carr* v. *Hoxy*, 5 Greenl. R., 60; *Ballard* v. *Hinkley*, 5 Greenl. R., 272; *Beals* v. *Allen*, 18 Johns. R., 363; *Canfield* v. *Ives*, 18 Pick. R., 253; *Jackson* v. *Phipps*, 12 Johns. R., 418.

A ratification cannot affect intervening right of third persons. *Sturdivant* v. *Robinson*, 18 Pick. R., 186.

Foster was not requested to make the mortgages under which the plaintiff claims. He had no authority from the plaintiff to cause them to be recorded, and there is no evidence that the plaintiff accepted them, or assented to them, or claimed under them, or knew of their existence prior to the attachment. There are stipulations in the mortgages to which the law would not presume his assent. It does not appear from whose possession they came when they were produced at the taking of the depositions of Foster and his son Henry, and Jacob Skillinger, which is the first knowledge we have of them.

The second and third instructions should have been given. The mortgager resided out of the state. He could not, as we contend, avail himself of the provisions of the statute as to recording mortgages of personal property, without placing himself in a position to comply with the provisions of ch. 114, s. 71, requiring him to render an account of the amount of the debt or demand secured by the mortgage, within six hours after demand made upon him in writing, by any person wishing to attach the interest of the mortgager. If no such demand could be made, why should it not be dispensed with, and the property be open to attachment, if found in the possession of the mortgager, without it. The mortgager should place the property in the possession of some person, on whom the demand could be made, authorized to receive the tender of the amount of the mortgagee's claim, or suffer the consequences attached to a neglect to render the account required by the statute.

The fourth request should have been complied with. A

part of the mortgaged property was, in its nature, subject to be consumed in its use, and was doubtless intended to be so consumed by the mortgager. Such a mortgage has been held to be invalid. *Robbins* v. *Parker*, 3 Met. R., 117.

There was another mortgage of the same date, from Foster to the plaintiff, of all the stock in trade now in and about the store occupied by him, together with the furniture, stove, scales, &c., valued at $2000, with a stipulation that Foster might remain in possession until the plaintiff should decide otherwise. *Divin* v. *McLaughlin*, 2 Wend. R., 596.

The instruction given to the fifth request was erroneous, because it limits the evidence of the fraudulent intent of the plaintiff *to the time of the execution of the mortgages*, when, in point of fact, there is no evidence that the plaintiff knew of the existence of them at the time of their execution.

The instruction to the sixth request is open to the same objection.

The instruction to the seventh request is erroneous, as authorizing the jury to find that a mortgagee might honestly take security on property and allow the debtor mortgager to consume it. Such a proceeding is not warranted by law, and the presiding judge should have so instructed the jury; and that if they found such facts, the law denounces them as fraudulent. *Robbins* v. *Parker*, 3 Met. R., 117, before cited. There being no dispute about the facts, it becomes a question of law whether the mortgage, under the circumstances, was valid. *Divin* v. *McLaughlin*, 2 Wend. R., 596.

The eighth, ninth and tenth requests should have been given. What is a reasonable time, when the facts are not in dispute, is a question of law. The facts here are the dates of the mortgages and the date of the attachment, respecting which there was no controversy, and there was no pretence of any demand of, or interference, on the part of the plaintiff, with the mortgaged property. *Atwood* v. *Clark*, 2 Greenl. R., 249; *Wingate* v. *King*, 23 Maine R., 35; *Kingsley* v. *Wallace*, 14 Maine R., 57; *Douglass Axe Co.*, 10 Cush. R., 88; *Hill* v. *Hobart*, 16 Maine R., 164. There being no time

stipulated for payment, the condition was broken immediately, and the title became absolute in Howe in sixty days.

The instruction given to the eleventh request was erroneous, as it authorized the jury to find the mortgages valid, if the plaintiff did not intend thereby to aid Foster in covering up the property, to hinder, delay, or defeat creditors, although they should find that the mortgages, from the nature and circumstances of the property, and the conduct of the parties respecting it could not have been, and were not, intended for security. The instruction should have been, that, if they found these facts, the mortgages were fraudulent. *Hartshorn* v. *Eames*, 31 Maine R., 93; *Twines' Case*, 3 Coke, 80.

The instruction that a mortgager might sell, exchange, or dispose of and consume, the mortgaged property, with honest intentions, if he substituted other property of equal value and made a new mortgage of said property to the mortgagee to secure the same debt, and that such a transaction would not necessarily be fraudulent, as to other creditors, was clearly erroneous.

This instruction is also open to the objection that it was calculated to mislead the jury, as it was not proved or contended even, that Foster substituted other property for the property sold, disposed of and consumed by him, and made new mortgages of it, as a substitution of the old.

The instruction requested respecting the assumed partnership and the mode of invoicing and marking the goods purchased by Foster, should have been given. At least, these facts should have been left for the consideration of the jury, to determine whether there was or could have been, under the circumstances, any honest purpose in these proceedings, and whether or not they were not designed to aid in covering up the property from the creditors of Foster, and whether the plaintiff was not aiding and assisting Foster in such fraudulent purpose, if they should find it to exist.

In the instruction given to the first request respecting the recording of the mortgages, the Judge says, "If, in accord-

ance with a previous understanding between Foster and Howe, testified to by Foster, that Foster should give Howe from time to time mortgages on all the property Foster should accumulate, to secure Howe for advances to him, Foster executed and carried these mortgages," &c.

Now there is an objection to this mode of presenting this evidence for the consideration of the jury. It seems to assume that there was such an understanding between Howe and Foster, that Foster should give Howe from time to time mortgages on all the property he might accumulate, and to give the sanction of law to such an understanding. On looking into Mr. Foster's deposition, he states, on cross-examination, that he did not know that there was any such an agreement, and makes further statements in relation to the giving of security, well calculated to destroy all confidence in the truth of the statement first given, touching the understanding alluded to by the judge, and in fact completely negatives it.

On the motion to set aside the verdict, I will merely say, that the verdict is against law and evidence, as the plaintiff founds his claim solely on the ground of three mortgages from Samuel J. Foster to him, and there is no evidence that these mortgages were delivered to, or accepted, or assented to, by the plaintiff, so as to make them effectual and binding contracts, prior to the attachment of the property sued for, by the defendant's deputy.

Under the instructions given, these facts cannot be considered as found by the jury. But if they could be, the finding would be against evidence, or rather without evidence. At any rate, it would be against law. No question was made, or can be made, as to the validity of the attachment, if the property belonged to S. J. Foster. It being found in his possession, and being legally attached and sold as his, upon execution, the plaintiff's action could not be maintained, without proving a valid title in himself. That he has failed to do. The evidence of fraud, on the part of Foster, acquiesced in by Howe, seems to be abundant.

Rowe & Bartlett, and *Bion Bradbury*, counsel for the plaintiff.

RICE, J. Trespass for taking certain property described in the writ. The defendant was, at the time of the alleged taking, sheriff of the county of Washington, and Charles Perkins was his deputy. The acts complained of were performed by Perkins. The defendant pleaded the general issue, with a brief statement, alleging that the property was taken as an officer, by virtue of a writ against one Samuel J. Foster. The case turned upon the question of title. To establish his title, the plaintiff introduced three mortgages from Samuel J. Foster to him, covering the property in controversy; one dated June 26, 1850; one January 1, 1853; and one December 1, 1855, with proof of their execution, &c.

In defence it was contended that these mortgages were fraudulent and void as to the creditors of Foster, and that the legal title to one of the horses, the mare called "Jessie," was not in Foster at the time she was mortgaged by him to the plaintiff. Among other evidence offered by the defendant to establish those points, was a mortgage from said Foster to one B. F. Brown, dated October 11, 1848, in which, there was evidence tending to show, the mare "Jessie" was included under the name of the "Whitney" mare. This mortgage was excluded by the court, and, as the defendant contends, erroneously.

It is contended, that the defendant cannot avail himself of the Brown mortgage, to justify his taking, by showing title in some party other than the plaintiff, unless he can connect himself with such outstanding title. This is undoubtedly true, if the object of the introduction of such evidence was to justify the taking of the property from the *possession* of the plaintiff. But the defendant denies that the possession was in the plaintiff at the time of the alleged taking.

Trespass lies for an injury to the possession. To maintain this form of action, the plaintiff must show that he has actual or constructive possession of the property sued for. The

defendant is not put to his justification until the fact of possession is established by the plaintiff; which fact may be controverted by the defendant. Now it is not claimed that the plaintiff ever had actual possession of the mare "Jessie." He had no personal knowledge of the animal—never saw her. He relies wholly upon constructive possession, arising by implication of law, from the alleged fact that the legal title was in him. Unless, therefore, he can establish his title, he is left without possession, either actual or constructive, and consequently without a basis for his action to rest upon, so far as this piece of property is concerned. To prove his title, he introduced a mortgage from Foster. The defendant replies that he obtained no title, and consequently no constructive possession, by virtue of that mortgage, for the reason that Foster had, before the execution thereof, divested himself of his title to the property, by mortgaging the same to Brown, and to show that fact, offered the Brown mortgage in evidence, which was excluded by the court. How the fact would have turned out, had the evidence offered been admitted, we cannot determine. Further investigation might have shown that the Brown mortgage had been paid, or in some way canceled or discharged, in which event the plaintiff's title and his constructive possession would apparently have been established; or it might have turned out that the mortgage had been foreclosed, and that the title of Brown had become absolute. This would have wholly defeated the plaintiff's right of action, in which event the defendant could not have been called upon by him, to justify his taking. The Brown mortgage was competent testimony, tending directly to establish this proposition, whether it was sufficient, or could have been made sufficient, with other testimony in the power of the defendant to introduce, we cannot determine. It certainly would constitute an important link in a chain of evidence having that legitimate tendency, and for that purpose should have been admitted.

An examination of the cases cited, and relied upon by the plaintiff, will show that the fact of *possession* in the plain-

tiff was either not controverted, or was established by the proofs.

The mortgage to Gilpatrick, offered by the defendant, dated December 22, 1855, was properly rejected. It could have no legal tendency to show fraud, or want of title in the plaintiff, being long after the date of his last mortgage relied upon.

There were many exceptions taken to the instructions of the presiding judge, and also to his refusal to give other instructions which were requested. But on examination, we do not find any errors in matters of law by which the rights of the defendant would have been prejudiced, or injuriously affected. It is not, therefore, deemed necessary to examine those objections in detail. In consequence of the rejection of the evidence above referred to, a new trial must be had.

Exceptions sustained,
and a new trial granted.

COUNTY OF WALDO.

JOHN E. THAYER ET AL. *versus* SYLVANUS ROBERTS.

An officer gave notice of the sale of an equity of redemption, to take place on Saturday, the twenty-fourth day of the month, when the twenty-fourth day of that month was Sunday. Such notice is invalid, and no title to the property is conveyed by a sale on Saturday the twenty-third; and an alteration of the notice by erasing twenty-fourth and inserting twenty-third eight days before the sale, does not cure the defect.

A return of the officer that he notified and made the sale on the last named day, is false, and he is liable in damages to one who had a subsequent attachment to the amount of the value of the property, as shown by the sale, after deducting the expenses thereof.

The facts in this were agreed by the parties.

The action is CASE against the defendant, as sheriff of Waldo, for a false return of S. S. Gerrish, one of his deputies.

March 26th, 1852, the Waterville Bank sued one Thomas Snell, of Unity, and caused an attachment of all his right, title and interest in and to real estate in Waldo county, to be made, which attachment was preserved until March 29th, 1855, when judgment was rendered in said suit against said Snell for $614.63 damages, and cost $10.54, on which judgment, execution was duly issued on the 30th of March, 1855, and placed in the hands of said Gerrish, then a deputy of the defendant, who was then sheriff of Waldo, for service. On the 24th of April, 1855, said Gerrish seized on said execution the right in equity of said Snell of redeeming two parcels of land in Unity, and afterwards, at a public auction, held at said Unity, on the 30th day of June, 1855, by adjournment from the 23d day of said June, he made sale of said right in equity to one Daniel H. Brown, for the sum of $323.12, and on the

same day executed and delivered to said Brown a deed of the same, as appears by the return of said Gerrish on said execution.

Notice of said sale was published in the Republican Journal, a public newspaper printed at Belfast, in said county, three weeks successively, the last publication being in a paper dated June 22d, 1855; the second in a paper dated June 15th, 1855; the first in a paper dated June 8th, 1855.

It is admitted that said officer in April, posted in a public place in Unity, and in Troy and Thorndike, two adjoining towns, notices of said sale, similar to said newspaper notice, in all respects, that the day of sale was stated to be on "Saturday, the twenty-fourth" day of June, instead of the twenty-third, which notice remained up and unaltered till eight days prior to said twenty-third day of June, when said Gerrish erased "24th," and inserted "23d." There was no other notice of said sale published or posted.

The deed of said officer to said Brown was duly recorded August 25th, 1855.

It is agreed that the plaintiff, on the 16th of October, 1852, sued out a writ against said Snell; that on the 19th of said October all of said Snell's right and interest in real estate in said county of Waldo was duly attached, and said attachment was preserved until March, 1856, at which time judgment was rendered thereon for the sum of $19,620.89 debt, and $36.89 cost, on which execution was issued, and within thirty days after rendition of judgment, on March 25th, 1856, placed in the hands of Eben Berry, deputy sheriff, of said county of Waldo, to be satisfied by levy on any property which could be found belonging to said Snell.

Said officer being unable to find property sufficient to satisfy said execution, returned the same unsatisfied, for a large sum, $17,000, as appears by his return.

Said Snell is admitted to be insolvent, and was at the time of said return.

It is admitted that more than a year after the said sale by Gerrish to Brown, said Brown being informed of the facts

regarding said notice, sold his right to said property for three hundred dollars.

Rowe & Bartlett, counsel for the plaintiffs.

The return of the officer, Gerrish, was false, in the statement that he had posted notices of the sale in Unity, &c., thirty days prior to the sale. The sale was on the 23d, and the notices of the sale on that day were not posted until *eight* days before the day of the sale. *Wellman* v. *Lawrence,* 15 Mass. R., 326, 330; 7 Pick. R., 554.

The notice in the newspaper was not sufficient. The three weeks of publication were not completed prior to the sale, but only fifteen days intervened between the first publication and the sale. If a week be simply a measure of time, consisting of seven consecutive days, then a publication three weeks successively must be a publication for twenty-one days. Had the publication been in a daily paper, through fifteen days, commencing on the 8th and ending on the 22d of June, would any one hold that to be a publication three weeks? Can the fact that the paper was published but once a week alter the case? Suppose the publication had been in a paper published twice a week — the notice then would have appeared in five consecutive numbers; would that have been a publication three weeks successively?

If a week be not simply an aggregation of seven consecutive days, but, as was held in *Rockendorff* v. *Taylor's lessee,* 4 Peters' R., 349, a definite period of time, commencing on Sunday and ending on Saturday, then the term "week," in the statute, is like the term "day," expressing an entirety; and the three weeks prior to the doing of an act must have fully expired before the act could be done. It cannot be legally done during the third week, as was done in this case. The word "week" has the same construction given in *Bazalgette* v. *Lowe,* 31 Eng. Law and Eq. R., 338.

The proper remedy for plaintiffs is by this action. *Whit-*

aker v. *Sumner*, 7 Pick. R., 555; *Whitaker* v. *Sumner*, 9 Pick. R., 308; *Bussey* v. *Leavitt*, 12 Maine R., 380.

Had the defendant made a true return, plaintiffs could and would have levied their execution upon the same equity of redemption. And the measure of damages is the value of the property which would have been applied towards the satisfaction of their execution, which is shown by the sale to have been $323.12, to which interest is to be added, from return day of our execution. *Whitaker* v. *Sumner*, 9 Pick. R., 308.

A. P. Palmer, counsel for the defendant.

The defendant is sued in this action for the malfeasance of a deputy in making an alleged false return, upon an execution in favor of the Waterville Bank v. Thomas Snell, which return was of a sale of an equity of redemption of certain lands in Waldo county, and upon which the plaintiff had a subsequent attachment.

After an examination of the facts in the case, and the legal authorities upon the question of the plaintiff's right to bring this action, and upon the point of the *validity* of the conveyance made by the defendant's deputy, the defendant makes but a single point, which arises upon the following facts as shown in the case:

The seizure was duly made, and the notice in the newspaper duly and correctly published. The deputy also posted notices in due time in Unity, where the land lay, and in two adjoining towns, appointing the sale at the same place, excepting that by a mistake he called the Saturday on which the sale was intended to have been held, "Saturday, the 24th," instead of the "23d" day of June, which was correct, and as it was in the newspaper. Having, some days after and about ten days before the 23d, discovered that he had made a mistake in the *posted* notices, he changed the figures so that they would read the 23d.

The question is, is that sufficient compliance with the laws

to justify the officer in stating in the return that he did, "on the 25th of April, 1855, give public notice, by posting and publishing notices, that he would sell on Saturday, the 23d of June?" Or, in other words, is the return false in any *material* or *substantial* sense?

The question arises upon so slight a variance of the return from the exact fact, that I have not been able to find any case which can aid the court.

The court will perceive, and every one would perceive, by looking at the posted notices or notice, (for it is not certain that more than one of them contained this trifling error,) what day was intended by the notice. The 24th was Sunday, and any one would know at once, that "Saturday, 16," or "Saturday, 30," could not have been intended, even if they had known, while looking upon the notice, that Saturday was not the 24th.

This was mere *clerical*, accidental error; and officers, like all of us, even the court, are not infallible, and are liable to make such mistakes.

When no one could, by any possibility, have been misled, or could by possibility have misconceived the day of sale, and when the subsequent attachor himself would only stand as he stood by virtue of his attachment, at the time it was made, will the court hold the defendant for infallible certainty and accuracy in his deputy? Suppose the return had been that he had given written notice to the debtor in hand, when in fact he had left it at his last and usual place of abode, and the debtor made no complaint. Would it be sound reason or good law to hold the defendant liable for a variance from exact fact, which were, to all practical good, complied with. How much less than reason, to hold to that extreme rigidity, when a variance only nominal and not of any practical disadvantage in understanding the notice, or working any disadvantage to subsequent attaching creditors?

Courts, even in their most solemn processes, allow amendments, even in some cases after they have been executed, to correct mere clerical errors, when no one is placed in a worse

situation than they would have been had not the accidental error occurred.

The statute does not point out any particular form of stating *the time of sale* in a notice. It was necessary to state the day of the week, *and* the day of the month. The notice would have been good had it said the third Saturday in June, or if it had said the 23d day of June; but the 24th being Sunday, was clearly a means to any one who intended to attend the sale, that Saturday, the 23d, was the day. If the sale had been appointed and intended for Friday, the 22d, and had been written Friday, the 23d, there would have been difficulty in knowing whether the mistake was the day of the week or the day of the month, but where the day would be Sunday, no such difficulty would arise in the mind. Indeed, most of those who read the notice for a moment would consider but Saturday *was* the 24th, and attend on Saturday.

Besides, the notice in the paper being the principal and general notice, would be that mostly read, and would at once correct the difficulty, if any existed. The courts in Massachusetts upheld a tax sale, when the notice of the sale contained no information as to what hour of the day the sale would be held, on the ground that the statute did not explicitly require it to be stated. *Coleman* v. *Anderson*, 13 Mass. R., 118. Our statute does not specifically require the officer to state the hour of the day that the sale shall begin. Yet it would cause a much greater hardship to parties interested to omit to do so, than can result in this case from the accidental mistake which all see through at a glance.

I wish to say one word in excuse for the officer in changing the notices, and in making the return to conform to the notices, as if they were correct exactly in the first instance.

He had accidentally erred in an effort to do exactly and correctly his duty. He was uncertain as to the effect of it upon the rights of the creditor, and he deemed it more just to all concerned, that his sale should be completed, after he discovered the mistake, and submit to the decision of the

court what the effect of his mistake was. For this reason he has in no particular attempted to disguise any fact, or called upon the plaintiff to prove them, but has frankly admitted them from the beginning.

If the court shall be of the opinion that the notice sufficiently explained itself to justify him in making the return, and that consequently the return is substantial according to the fact, no one is injured.

APPLETON, J. It appears that one Gerrish, a deputy of the defendant, having seized an equity of redemption as the property of one Snell, on an execution in favor of the Waterville Bank, against him, proceeded to post up notifications of the *time* and place of sale, in the town where the land lies, and in the adjoining towns. In these notifications the *time* of sale was stated to be on Saturday, the 24th day of June, when it should have been the 23d of June, the 24th being Sunday. Having ascertained his mistake, the deputy canceled the same, eight days before the time appointed, by erasing 24th and inserting instead thereof 23d. On Saturday he proceeded to sell the equity. According to his return of his doings, the notifications stated the time of sale to be on the 23d of June.

The plaintiffs, having a subsequent attachment upon the real estate of Snell, on which they obtained judgment and sued out execution, have brought this action to recover damages for the false return of the officer, in falsely stating that he had posted up notifications stating the sale to be on the 23d of June, when in truth it was notified to be on the 24th of June.

The return, as made, discloses no error or mistake, and conveys the equity of redemption to the purchaser. If the officer, in his return, had stated the sale to have been on Saturday, the 24th of June, that day being Sunday, or if he had therein truly set forth his original mistake and its subsequent correction, and the time when made, it would have disclosed a failure to comply with the requirements of the

R. S., ch. 94, s. 37. In either event the sale would have been invalid. In *Willman* v. *Lawrence*, 15 Mass. R., 326, the sale was advertised to be on Friday, the 17th, when Friday was, in fact, the 16th. In reference to this mistake the court say, "The mistake made in advertising the sale is sufficient to render it void. There is the utmost necessity of precision in transactions of this nature. Those who might be disposed to attend the sale as bidders, would be deterred by observing such a blunder. The canceled notice on the day of sale did not leave sufficient time for general information."

The return of the officer being false, and being so far conclusive that the title of the equity passed to the purchaser at the sheriff's sale, the plaintiffs could not take it on their execution. They have, consequently, a right of action against the defendant, for the false return of his deputy. The measure of damages is the value of the property which they would have been enabled to apply in satisfaction of their execution. This is shown by the sale on the execution in favor of the Waterville Bank, and that amount does not seem to be disputed as correct. For that amount a default must be entered, after deducting therefrom the expenses of the sale. *Whitaker* v. *Sumner*, 7 Pick. R., 555; *Whitaker* v. *Sumner*, 9 Pick. R., 308.

Defendants defaulted.

COUNTY OF AROOSTOOK.

LEVI BERRY *versus* RUFUS DWINEL ET AL.

Where a party contracts to deliver goods at a particular time and place, and no payment has been made; the true measure of damages is the difference between the contract price and that of like goods at the time and place where they should have been delivered; but if there be no market value at the place of delivery, the value of the goods should be determined at the nearest place where they have a market value, deducting the extra expense of delivering them there.

Neither the gain or loss which the contracting party might have made, or necessarily suffered if the contract had been performed, or the purposes and objects of the contract, can affect the measure of damages for the non-fulfillment of the same.

EXCEPTIONS were taken by the plaintiff to the rulings of CUTTING, J.

The ACTION is ASSUMPSIT on an account annexed for cutting and hauling about two million feet of pine and spruce logs. The logs were cut under a written contract, by the terms of which the plaintiff agreed to cut and haul at least four million feet. The present action was brought to recover the balance due for cutting and hauling the logs actually cut at the contract price, a part having been paid.

To prove the damages sustained by the defendants for a non-performance of the full terms of the contract on the plaintiff's part, the defendant offered evidence to prove the damages sustained by him from not having a sufficient quantity of logs to stock his mills at Oldtown; and that in the spring of 1854 logs were bought at Mattawamkeag Forks, on the Mattawamkeag stream, at the rate of five to seven dollars per M. This evidence was objected to by the plaintiff, but admitted.

The defendant, Dwinel, testified that he contracted with the plaintiff to cut and haul these logs for the purpose of stocking his mills at Oldtown; that he did not intend to sell them at all in the log, but it was his intention to manufacture them into lumber, and he claimed damages for want of the lumber to manufacture at his mills.

On the contrary, the plaintiff contended, and offered evidence tending to prove, that the non-performance of the contract was the occasion of no damage to the defendant, but that he was benefited by it, as the logs were of less value than their cost, had they been cut.

The court instructed the jury, among other things, that in considering the question of damages sustained by the defendant, from the non-performance of the contract, they would find whether the logs had a marketable value at Mattawamkeag Forks; if so, they would take the price there as the criterion of the value of the logs, and find damages accordingly, without any regard to the defendants' design respecting them; that it was of no importance what they would have done, or intended to do, with the logs, if they had been cut, or what their object was in contracting to have them cut, but they would estimate the damages according to the market value of the logs, at the first place where they had a marketable value, whether it was on the shore where they were cut, or in the river at the Forks, or in the boom, after deducting from such marketable value the stumpage, the contract price for cutting and hauling, and the expenses of running to the place of sale. The jury returned a verdict for the defendants. To the several rulings and charge aforesaid, the plaintiff excepted.

A. W. Paine, counsel for the plaintiff.

The defendant showed that certain logs were sold in the spring of 1854, at Mattawamkeag Forks, at a given price. Upon which the court instructed, that in estimating the damages, they could do so according to the market value at the first place where they had a marketable value, whether on

the shore where they were cut, or in the river at "the Forks," or in "the boom." This was erroneous.

In the first place, the rule was unjust in making the plaintiff responsible for a price for the logs at a point where he was under no obligation to have them, and where there was no certainty of their being, to command the market price at that point. This point has good illustration from the facts here detailed. The high prices paid, and which the jury took as the criterion, were those testified to by Stockwell & Eddy, who bought logs at "the Forks," in the early spring. This place is some twenty or more miles from the place where these logs were cut, and embrace all the most difficult part of the whole distance from the landing to the boom for the driving of the logs. There is the delay.

It also appears that the logs in controversy, though cut in 1853–4, arrived at the boom, some in 1854, some in 1855, some in 1856, and some are still behind. Where the logs were thus delayed, does not appear, but the truth probably is, that they were above the Forks. This being the case, the plaintiff was by the ruling made responsible for the price of the logs at a place where he was not only not bound to have them, but where nature forbid their being at the time. By taking the price as a criterion at any point below the landing, where the plaintiff was by contract to haul them, he is thus injured, as he is burdened with what he never assumed, either impliedly or by any express contract. *Non constat* that the logs would arrive at the Forks, to take advantage of the price. This consideration alone shows the wrong of the rule laid down by the court. But this is only the weakest of the many arguments against its correctness.

A second objection to the ruling lies in the proposition that the jury would disregard the *intended object* of the defendant in contracting to have the logs cut, and would take the *price* as a criterion, without reference to the design of the defendants in respect to the logs.

Taking for granted the correctness of the rule adopted by

the court, that the value of a thing at the time and place of agreed delivery is the measure of damages for its non delivery, there is still a most erroneous application of the rule here in the way the court have given it. That principle is at most but a *general* one, and not by any means one of universal application. Circumstances may aggravate the damages above that, as also depress them below, as we shall have occasion by and by more fully to remark.

The question submitted is one of *damages suffered by the party defendant from the plaintiff's non-fulfillment* of his part of the contract. And how can these be in any way so legitimately shown, as by measuring the matter by the intended use which the party was to make of the performance. The party is not to be allowed, on the one hand, for a profit which could not in the nature of things have been enjoyed if the contract had been fulfilled, nor, on the other hand, is he to be deprived of a benefit which he would naturally have enjoyed, merely because the other party did not know of it. All the circumstances are to be considered, and more especially the *reasonable* intentions of the party respecting it. In no other way can the true damages be assessed.

A agrees for the delivery by B to him, at a given time and place, of a quantity of flour or pork, articles of which the market of the place at all times affords a supply. The non-delivery in that case is easily compensated by the plain rule of its value at the time and place. But suppose it to be at a place where the market is bare, and the contractor, intending to transport it to other places for a market, or for his own use, is obliged to delay his teams or his vessel; this demurrage is equally to be allowed for, besides any profits which the delay has deprived him of. If, however, he would have stored it for sale at the place where it was to be delivered, and the market fell after that, would not the damages be accordingly. And if, instead of either, he intended to supply his teams in the woods, and by the non-fulfillment of his contract to transport it, it is not only delayed, but the

teams in the woods necessarily obliged to suspend work for want of it, would not all these direct consequences be legitimate cause of damages.

A agrees for a house frame of a peculiar construction with B, to be delivered at a certain time and place, which B designs erecting on the spot, and delay does not injure him at all, as he is not ready to proceed with it. He also contracts for another of the same construction (such as the market does not afford), to be transported to another port, and a delay causes a demurrage of a vessel especially chartered to transport it. What are the damages? Very clearly in the first he can get nothing, and as clearly in the latter he can recover for the demurrage. And yet the only difference is in the *intended* design with reference to each.

In the case at bar the design of the defendant, as he himself acknowledges, is expressly to stock his mills at Oldtown with the logs contracted for. He admits he did not intend to sell them; he should not have sold them if cut; he did not intend to sell them, and never had sold any; and further, he very properly introduces testimony to show the loss he encountered by not having them at his mills as he intended and should have had if the plaintiff had performed.

The matters to be considered in estimating damages in all cases are the natural and direct results of the breach—this and nothing more.

Was the loss of the profit which might have been made by a sale at Mattawamkeag Forks, or somewhere else along the river, a natural and direct result of the breach here? The party swears *it was not*, yet the court compel the jury to say *it was*.

Parsons states the doctrine on this point to be: "The party should not be permitted to make a profit by the breach of his contract, which he could not have naturally expected to make by its performance. The inquiry should be, what was the value of the thing at that time, taking into consideration all proved facts of price and sale, and all rational and

distinct probabilities, and nothing more." "Nor should one party be subjected to a loss, and the other be permitted to make a saving on a mere speculative probability." 2 Parsons on Con., 482.

The rule contended for is this, that if a party in contracting have a definite object in view, and by a non-performance of the other party, that object is affected favorably or unfavorably, the jury have a right to consider that object and its effect upon it, in making up their verdict—that they should consider that with all other legitimate results of the non-performance.

The jury should have been allowed to take the whole subject into consideration, and on the whole to say what damage has been suffered, if any. *Hingston* v. *Kelley*, 18 and 3, Exch., 360.

Another objection arises from the adoption of the rule given, in its *want of mutuality*. The true rule should be one that will work both ways, and while Berry is bound, Dwinel also should be.

Suppose Dwinel, having contracted here for the cutting of the logs for his mills, had delayed making other purchases until the market is bare, and he meets with an actual loss in detention of mills, &c., is he to be met with proof that the price of logs was such that he would have lost if he had undertaken to *sell*. He could well reply, I did not intend to sell, and therefore I protest against allowing for losses which my means for manufacture and keeping would have enabled me to avoid. The rule will not work both ways—it lacks reciprocation, and is consequently wrong.

A still more objectionable ruling of the court is in the instruction that the jury should regard *the price* at Mattawamkeag Forks, &c., as the criterion of *value*, and find damages accordingly.

This is *not* a contract for the *sale* or *delivery* of property, but a *contract for work and labor* to be done by the plaintiff on the defendant's property.

The two are entirely different in their character, and are governed by entirely different principles in the appraisement of damages in case of non-performance.

In the former case, for the non-delivery and sale of property according to agreement, the damages are to be assessed *generally according to the value of the thing at the time and place of agreed delivery.* 2 Greenl. on Ev., s. 261.

But this rule even is only a "general" one, and by no means an *absolute* or invariable one. If particular damages are suffered beyond the value, those are to be added. Thus if delay or necessary loss is occasioned by non-performance, these constitute a legitimate basis of damages. And if, on the other hand, there are facts to extenuate the damages, these may be given in proof accordingly.

In either case the party is to be *indemnified.* This is the great rule of damages in all such cases, viz.: that the innocent party should be made whole, or be completely *indemnified* for the loss which the non-performance has occasioned. Such is the language of all the authorities. *Shaw* v. *Nudd,* 8 Pick. R., 9–13; *Swift* v. *Barnes,* 16 Pick. R., 196–7.

This rule for the price of goods delivered to be considered as the criterion of damages, being thus but a general one, is liable still to be affected by *every* legitimate consequence growing out of the non-performance. Thus while it holds the one party to a full payment of all damages, it still holds the other to all reasonable care and precaution to keep these damages within proper bounds. *Mellen* v. *Mariner's Church,* 7 Greenl. R., 51, 56.

So that though we take that rule for the government of the case at bar, the ruling of the court is still erroneous, in making the price a criterion, and the only criterion, without any reference to any other circumstances.

We have so far considered the case of contracts for the sale and delivery of property, where the *general* rule is the price or value of the thing at the time and place of agreed delivery.

The case at bar is, however, a very different one. It is

not a contract for the sale and delivery of property, but a contract for work and labor to be performed on the defendant's property. This altogether changes the case. The thing is already the party's, (the purchaser's, as it were,) and all the party contracting has to do is to labor on it. In default of performance, the property does not become the contractor's, to be retained by him, but it is still the property of the original owner. Here is the basis of the rule provided in that case. The property in case of an agreed sale, and non-performance being the party's own, nothing passes to or from the other, and hence the measure of damage is plain and easy of understanding. The *status* of the party agreeing to purchase being unchanged, and the property not forthcoming, the rule is made so as to put the party in possession of the property agreed for. But here the property is the party's, and the contractor agrees to work upon it so as to accomplish a given result—bring it into a given state or condition of change or improvement. Whether the job is performed or not, the property still belongs to the original party.

Hence the rule governing damages in such case, must be different altogether from that in case of the sale of property. The rule in such cases is no where stated to be according to the value of the thing at any given market, nor is this by any of the authorities made a criterion. On the contrary, the rule is substantially this, that "the party shall pay such a remuneration as the benefit conferred is reasonably worth," or "what he has derived benefit," so that the party shall receive what he deserves. 2 Smith's Leading Cases, 14, 29, 30, &c. *Snow* v. *Ware*, 13 Met. R., 42, where the court say, "the law implies a promise by him to pay such sum as the benefit which he receives is reasonably worth." 2 Greenl. on Ev., s. 104, uses the same language in giving the rule, and this court have adopted the same rule in *Lawrence* v. *Gullifer*, 38 Maine R., 532; *Bassett* v. *Sanborn*, 9 Cush. R., 64; 6 N. H. R., 481. And such is the tenor of all the authorities, that the actual *benefit* which the party has received

over and above the injury which he has suffered from non-performance is to be allowed.

This rule perhaps leads to another as to what shall be the measure of deduction or allowance for that which is not performed. Upon this point the authorities are all plain and simple.

The leading case of *Hayward* v. *Leonard*, 7 Pick. R., 185, requires "so much to be deducted as is the loss or damage occasioned," i. e., so much as the party is injured by the other's fault.

Bassett v. *Sanborn*, 9 Cush. R., 66, "a remuneration should be made for omissions."

Gleason v. *Smith*, 9 Cush. R., 486, "deducting such sum as will indemnify the party," &c.

Bowker v. *Hoyt*, 18 Pick. R., 558, "may reduce the plaintiff's claim by showing any damages they have received by the plaintiff's failure."

Smith v. *Cong. M. H.*, 8 Pick. R., 178, so much was deducted *as would make the party whole*, or put the work into the state agreed upon.

Jewett v. *Weston*, 2 Fairf. R., 349, so much to be deducted as the defendant suffered by reason of non-performance. 14 N. H., 131, "the damages" are to be deducted. *Rogers* v. *Humphrey*, 39 Maine R., 382, the damages deducted were "those sustained by reason of the failure."

The question may recur, what are "the damages?" This is answered in *Hadley* v. *Baxendale*, 26 Law and Equity, 398. "The damages are such as both parties, in making the contract, may reasonably be supposed to have contemplated as the probable result of a breach."

"Damages for breaches of contract are only those which are incidental to and directly caused by the breach, and may be *reasonably supposed to have entered into the contemplation of the parties*, and not speculative profits and accidental or consequential losses." 2 Kent's Com., 480, and note.

"The damages," then, which are to be allowed for the non-performance are to be the actual and existing injury which

that non-performance has caused the party—not any fanciful, imaginary, speculative, or possible injury, but such reasonable, direct and probable injury as the condition and intention of the parties may have suggested—such an injury as may have arisen from a non-enjoyment of a benefit "naturally expected in its performance." 2 Parson's Con., 482.

This is conformable to the rule laid down in *Waters* v. *Townes*, 20 Eng. Law and Equity, 410, where the court say, "the jury, though not bound to assess damages at the amount of the profits, yet they might do so if satisfied by reasonable evidence that the plaintiff would have obtained such profits, if there had been no breach."

The case of *White* v. *Oliver*, 36 Maine R., 92, adopts in fact the very principle we contend for, to the exclusion of that given in the ruling. The jury were directed "to deduct for non-performance so much as it would cost to make the house according to the agreement." The full court say this is wrong. The party may not have been injured to that amount. The plaintiff should recover according to the contract price, "after deducting so much *as they are worth less* on account" of the non-performance. In other words, so much as the party has actually been damaged.

Sedgwick on Damages, 59. The party is not liable for a "damage that could not have been contemplated at the time of the contract." See also p. 67.

And this is the doctrine of the Napoleon Code, which held the contractor "liable for the damages foreseen, or which might have been foreseen at the time of the contract."

If we would apply the rule in the case of contract for *sale* to that of *work* on property, it would seem to be just to estimate not the value of the *property*, but the value of the *labor* bestowed, which brings us directly back to the rule urged, viz.: the actual value of the labor to the party contracting. How much has he been actually benefited?

The rule charges the whole loss over against one item of the value, viz.: the work of cutting and hauling alone. Should not the work of *driving* come in also?—and more

than all, the value of the trees? How much ought each to bear of the loss?

These considerations show how extremely contingent and uncertain are all these consequences for which the court have, by the rule, allowed the jury to assess the damages in the case.

The whole series of authorities on the point of direct and consequential damages, go to the length of excluding such testimony from the consideration of the jury. Sedgwick on Damages, ch. 3; 2 Greenl. on Ev., s. 256, and cases cited, and s. 261.

Besides, it is now well settled, that anticipated *profits* arising from such a contract as this cannot be allowed as an item of damages. The consequences in this respect are so contingent and uncertain, the court will exclude the whole. Such is now the settled doctrine in England. *Peterson* v. *Ayre*, 24 Law and Equity R., 382. And also in this country. Sedgwick on Damages, p. 69; *Smith* v. *Cardy*, 1 Howard R., 28; *Blanchard* v. *Ely*, 21 Wend. R., 342; *Thompson* v. *Shattuck*, 2 Met. R., 615; *Williamson* v. *Barrett*, 13 Howard R., 101; *Masterton* v. *Mayorse*, 7 Hill R., 62, in which the court say, "any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration *not* to be taken into the estimate."

The court in that case draw the line between those profits which are allowable and those of the opposite character, plainly placing the case at bar on the disallowable or inadmissible side. The profits allowable are such as are a "part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for," &c. "They are presumed to have been taken into consideration and deliberated on before the contract was made, and formed perhaps the only inducement to the arrangement."

To apply the case to the case at bar, could the *profits* of a sale of the logs at "the Forks," have entered into the minds of the parties contracting, when the party swears he never

dreamed of such an arrangement, and never intended to sell there or anywhere else?

J. A. Peters, counsel for the defendants.

The testimony objected to was one mode of showing value of the logs at a place certain. It was testimony tending to show what logs were worth, and was clearly admissible, according to the cases of *Warren* v. *Wheeler*, 21 Maine R., 487; *L. and W. C. R. R. Co.*, 13 Met. R., pp. 326, 327.

The rule of damages was correct; no absolute or perfect rule could be adopted, and courts approach a right standard as nearly as they can. This point is virtually settled in the case of *Smith* v. *Berry*, 18 Maine R., 122. Damages, in that case, were the "value of the articles at the time they should have been delivered." Apply that rule here; — what was the value of the articles at the time of delivery? It was precisely what they would bring at the first market, taking out any expense of getting them there. See *Parks* v. *Boston*, 15 Pick. R., 206, 207; *Gardner* v. *Field*, 1 Gray R., 154; *Dana* v. *Fielder*, 2 Kernan R., 40, and cases cited.

Dwinel testified what *he* intended to do with the logs; but there were two other defendants besides him.

What is hay worth a ton, at Exeter, Maine? There are no sales of hay in Exeter, but at Bangor, the nearest market, it is worth eleven dollars a ton; and it is worth one dollar a ton to haul it from Exeter to Bangor. What can be clearer than that its value at Exeter is ten dollars.

APPLETON, J. When a party contracts to deliver goods at a particular place, and within a definite time, and no payment has been made, the law seems well settled, that the difference between the contract price and that which goods of a similar description and quality bore at the time when and the place where, by the contract, they should have been delivered, is the true measure of damages. Mayne on Damages, 81. Now whether logs are to be delivered within a definite time, and at a particular place, by virtue of a contract of sale, or

of a contract for hauling, are considerations in no way affecting their value.

The instruction that the value of the logs was to be determined at the first place where they had a marketable value, whether it was on the shore where they were cut, or at the forks of the river below, or in the boom, was correct. The market value of the logs at the time and place of delivery was the fact to be ascertained. But if, at the time and place of delivery, they had no market value, is the party violating his contract, therefore, to be exonerated from all liability and entirely exempted from the payment of damages? The market value is only ascertainable by sales made. If there had been none on the precise day, then it is necessary to have recourse to sales nearest the time at which the goods in question should have been delivered. *Dana* v. *Fielder*, 2 Kernan R., 40. The same principle applies in space. If at the place where the logs were to have been delivered there was no market, then their value at the nearest points which afforded a market, and at which sales were usually made, should be ascertained, in reference to the damages sustained. Such was the rule in *Gregory* v. *McDowell*, 8 Wend. R., 435, where the court held that evidence of value at other places in the neighborhood of the place of delivery might be admissible for the purpose of showing "what their true value was at that place. But when the evidence is clear and explicit as to the value of the article at the place of delivery, such value must control, no matter what the value is at other places." The necessity of this rule is apparent, as otherwise the law would afford no adequate security for the performance, and no sufficient punishment for the violation, of contracts.

The marketable value of the logs being ascertained, the stumpage, the contract price for cutting, hauling, and the expenses of running to the place of sale were, according to the instructions of the presiding judge, to be deducted. This was correct. They were expenses necessarily incurred in getting the logs to the place where they would be articles

of sale, and should be properly deducted from their market value when that was ascertained.

It seems from the testimony of Dwinel that it was not his intention to have sold the logs, but to have manufactured them. The plaintiff alleges that if the logs had been delivered according to the contract, and had been manufactured by Dwinel, according to his declared intention — that, as prices were shown to have been for boards manufactured out of logs of the description in the contract, the defendants would have made severe and heavy losses, and that, consequently, instead of having been injured by his non-performance of the contract the defendants were essentially benefited thereby, and that therefore they are not entitled to claim by way of *recoupment* any deductions from the plaintiff's demand.

The presiding justice instructed the jury, in finding the damages, to disregard "the defendants' design respecting them; that it was of no importance what defendants would have done, or intended to do, with the logs if they had been cut, or what their object was in contracting to have them cut," &c.

The theory of the law as to damages is that they are to be a compensation and satisfaction for the damages sustained. It rarely happens in any case that this can be completely attained. Even in the simplest case arising from the non-payment of money, the damages may be insufficient to remunerate the creditor for the injury arising to him from the non-payment of his debt, or to place him in as good a situation as if it had been paid when due. In more complex cases the difficulty of establishing rules which shall meet all the fluctuations of commercial life is still more apparent. The most that can be expected is to fix general rules, which shall approximate to that great end.

The measure of damages for the non-delivery of an article, as has been seen, is its value at the time and place of delivery. Remote and consequential damages — possible gains and contingent profits — are not allowed. The damages

recoverable are limited to such as are the immediate and necessary result of the breach. *Bridges* v. *Stickney*, 38 Maine R., 361. "I am satisfied," says Judge STORY, in the schooner Lively, 1 Gal., 314 and 325, "that an allowance of damages, upon the basis of a calculation of profits, is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty." The price is based on the market value of the thing to be sold or delivered. It operates as a liquidated estimate of the worth of the contract to both parties. "It is obviously unfair that either party should be paid for carrying out his bargain, on one estimate of its value, and be forced to pay for failing in it, on quite a different estimate. This would be to make him an insurer of the other party's profits, without any premium for undertaking the risk." Mayne on Damages, 6. The purpose of the purchaser, the anticipated disposition of the thing purchased, and the probable profits, in case the anticipated disposition had been made, are not ordinarily the proper subject of damage. The actual loss at *the time and place* of delivery seems the true rule to be gathered from all the cases.

But the same principle which prevents the plaintiff from recovering for imaginary profits, equally deprives the defendant from setting up speculative losses, which, if the bargain had been completed, the purchaser might have sustained had he carried into complete effect his contemplated purpose. If remuneration is not to be made in the one case, neither is deduction to be made in the other. The party violating his contract is not to make profit from its non-performance, because, if it had been performed, and the other party had acted up to his original intention, losses might have occurred.

The parties contracted for the delivery of logs at a particular place, and within a prescribed time. The plaintiff's remuneration, if he performed his agreement, was neither to be increased or diminished by any disposition of the logs which the defendants might make between the time of their

delivery, by the terms of the contract, and their conversion into boards, and their final sale. Failing to perform his agreement, he is not to be exempted from damages in consequence of possible, or even probable losses, which might have arisen subsequent to the time, when, by its terms, it should have been performed.

It is not perceived that the plaintiff has suffered in his legal rights from the rulings to which exceptions have been taken.

Exceptions overruled.

COUNTY OF HANCOCK.

JOHN BILLINGS ET AL. *versus* WILLIAM F. COLLINS.

The well established rule of the law merchant for the security of negotiable paper, that the innocent indorsee of a note, before it becomes due, without notice and for value, holds it unaffected by any equitable considerations as between the antecedent parties, is limited to such as have been indorsed in the regular course of trade.

The assignee of an insolvent assignor, under an assignment law of the state, can represent only the rights and obtain the remedies of the insolvent.

FACTS AGREED.

ASSUMPSIT on a promissory note, of which the following is a copy:

"DEER ISLE, January 13th, 1855.

"For value received I promise to pay Jacob Dodge, or order, five hundred twenty-nine dollars, in one year, with interest after six months. [Signed] W. F. COLLINS."

Indorsed on the back, "without recourse."

"JACOB DODGE."

The genuineness of the signatures were admitted.

It is agreed by the parties that the note was originally given for a part of the brig Angeline Avery, which Dodge conveyed to the defendant, by a bill of sale, in common form, at the time of the making of the note.

That the note came to the plaintiffs by virtue of an assignment to them by Dodge of all his property, for the benefit of his creditors, in pursuance of the provisions of the statute concerning assignments, August 17th, 1855. That by the deed of assignment the plaintiffs became obligated to said Dodge, and to the creditors, to dispose of the property assigned in the manner prescribed by said statute. That many of said Dodge's creditors became parties to said assign-

ment, and relinquished their claims upon said Dodge, and relying upon the obligation aforesaid of the plaintiffs, and that said claims amount to a much larger sum than the value of the property assigned. That at the time of said assignment said note had not become due, and that the plaintiffs, nor said creditors, were aware that there was any defence to said note, or any reason why it should not be paid at maturity; and that the defendant has not returned said vessel either to said Dodge or to the plaintiffs.

The defendants offered testimony tending to show that, on the sale of the brig, said Dodge made false representations as to the construction and materials of said vessel. That there were latent defects in the construction and fastenings of her hull, unknown to the defendant, which greatly lessened the value and safety of said vessel, and that the same was known to said Dodge, to the admission of which testimony the plaintiffs objected.

It is agreed that if it shall be the opinion of the whole court, that said testimony is admissible then the action shall stand for trial; if otherwise, the defendant is to be defaulted.

B. W. Hinkley, counsel for the plaintiffs.

Thomas Robinson, counsel for the defendant.

CUTTING, J. This suit is brought to recover the amount due on the defendant's note to one Jacob Dodge, an insolvent assignor, to the plaintiffs, his assignees under the statute of 1844.

The defence set up is a failure or a partial failure of consideration, and the question presented is, whether such defence is open to the defendant, the note having been thus transferred before its maturity.

According to the law merchant, for the security of negotiable paper, the innocent endorsee of a note before it becomes due, without notice and for value, holds it unaffected by any equitable considerations as between the antecedent parties. If there can be a lingering doubt as to the truth of a proposition so long and well established, such doubt must

be removed on consulting the authorities cited by the plaintiff's counsel.

But in order to give the indorsee such rights, the note should have been indorsed in the regular and usual course of trade. Assignments of negotiable paper by operation of a bankrupt law of the United States, or of an insolvent, or an assignment law of the state, cannot be said to have been made in the regular course of trade. The assignees in such cases can represent only the rights and seek the remedies of the insolvent. According to the agreement of the parties, the action must stand for trial.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

WHO HEARD AND DETERMINED THE CASES

FOR THE

WESTERN DISTRICT,

1857.

HON. JOHN S. TENNEY, LL. D., CHIEF JUSTICE.
HON. RICHARD D. RICE, J.
HON. JOHN APPLETON, J.
HON. JONAS CUTTING, J.
HON. SETH MAY, J.
HON. WOODBURY DAVIS, J.

ALL OF WHOM CONCURRED IN THE OPINIONS IN THE CASES

FOLLOWING, UNLESS OTHERWISE INDICATED.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1857.

—o—

COUNTY OF ANDROSCOGGIN.

—o—

SAMUEL ROGERS *versus* EBENEZER E. WAITE.

If the defendant would justify an assault, he must show that the plaintiff first assaulted him, and that his acts were necessarily in defence of his own person.

And he must also show that the force used by him was appropriate in kind, and suitable in degree.

EXCEPTIONS to the rulings of MAY, J.

This was an action of TRESPASS for an alleged assault and battery, to which the defendant pleaded the general issue, with a brief statement of justification, that the injury, if any, was inflicted by the defendant in self-defence, from the assault of the plaintiff.

Evidence was introduced tending to show that the defendant struck the plaintiff with an open knife, and that the plaintiff sustained injury from the defendant at the time and place alleged in the writ, and evidence was also introduced tending to show that the plaintiff, at the time and place when and where he sustained said injury, commenced the first assault, and was in the act of assaulting and striking the defendant again, and that the said defendant did not strike with a knife, but struck the blow with his fist only, which occasioned said injury, in self-defence and for his own protection.

The presiding judge instructed the jury, that if they found that the plaintiff was the aggressor, and was in the act of assaulting and beating the defendant, at the time the injury, if any, was inflicted on the plaintiff by the defendant, this would authorize the defendant to use sufficient force for his own defence, and for the protection of his own rights or person, but that if, in repelling the plaintiff's assault, the defendant used unnecessary and unreasonable violence and force, under the circumstances, he would be liable to the plaintiff in damages in this action for such excess, and the plaintiff, in such case, would be entitled to recover damages for the injury occasioned him by such unnecessary and unreasonable violence and force, and other appropriate instructions were given, to which no exception was taken. The jury found a verdict for the plaintiff, and the defendant excepted.

C. W. Goddard, counsel for the defendant, argued in support of the exceptions.

It is not the purpose of the defendant's counsel to burden the court with precedents or authorities, being fully aware that they are perfectly familiar with such as have any reference to the single point in question, but, on the contrary, very briefly to indicate, independent of authorities, my views on this subject, and the reasons why, in my judgment, a different instruction should have been given to the jury.

It is believed that when a man deliberately violates the law, by breaking the peace and assaulting and beating his peaceful neighbor, provoking his anger and exciting his passions, voluntarily, wilfully and needlessly, he is not in an attitude which the law will regard with favor or approbation; that public policy, justice, and a proper regard for the public peace, and that respect for individual rights and the sanctity of the person of every citizen, which a free and well regulated government should entertain, should not allow such a violator of law to avail himself of his own wrong, and sue for compensation for damages directly occasioned by his own lawless and criminal conduct, unless he can clearly show

that the injury of which he complains may not only appear in some degree excessive, or what is the same thing, "unnecessary and unreasonable," to the calm deliberation of a jury, far removed from the time and place of provocation and assault, but unless he can plainly prove that the injury inflicted was so excessive, unreasonable and unnecessary, as to have been within the knowledge of the party originally assailed and now sued, or, in other words, that he should be compelled to satisfy the jury that the party originally assailed and naturally excited, thrown off his guard by the attack, acted with evil intention and a bad motive.

It seems hard that a man unexpectedly and most unjustifiably assaulted, while in the peace of the state, and thus called on to defend himself at a moment's notice, should be compelled to weigh, at his peril, the exact amount of force absolutely necessary for his protection, with the certainty that he must pay the assailant, in money, for any excess, however slight, which a jury, months afterwards, may conclude existed, although every member of the panel may be satisfied that the party assailed acted in entire good faith, and from the most justifiable motives, and that he had good reason, *at the time and place*, to apprehend further violence, and to believe that the force he used was absolutely necessary.

If a violator of the public peace is to be permitted to claim *civil* damages at all, for injury sustained while acting in defiance of law, let it be restricted to cases where the force employed in the defence and protection of his victim is *grossly excessive*, so as to involve either a *malicious disposition* or an *inexcusable* want of judgment on the part of the defendant.

T. & M. T. Ludden, counsel for the plaintiff.

DAVIS, J. In an action of trespass for a personal assault, if the defendant justifies under the plea of *son assault demesne*, he must show that the plaintiff committed the first assault, and that what was thereupon done by him, was in

the necessary defence of his own person. Greenl. Ev., s. 95. And he must also show that the force used by him was appropriate in kind, and suitable in degree. *Commonwealth* v. *Clark*, 2 Met. R., 23.

The instructions given in this case are in accordance with these principles.

Exceptions overruled.

STATE *versus* DANIEL BURNHAM ET ALS.

In *scire facias* upon a recognizance conditioned that the principal should appear and answer to an indictment found against him which was forfeited before action was brought; it is no bar to such action that the principal defendant was subsequently arrested in a neighboring state, and lodged in jail within this jurisdiction by virtue of the same indictment upon which the recognizance was taken.

A surrender of the principal in court after a forfeiture of a recognizance in a criminal case, before final judgment on *scire facias* will not release sureties without payment of costs.

REPORTED by TENNEY, C. J.

This is an action of SCIRE FACIAS, against the defendants, on a recognizance for the appearance of the principal defendant before the Supreme Judicial Court, to be holden at Auburn, within and for the county aforesaid.

Subsequent to the commencement of this action, and before service upon the said Burnham, a requisition was obtained, by the state, from the Governor of this state, upon the Governor of New Hampshire, for said Burnham, and such proceedings were had thereon that the said Burnham was arrested and brought into this state, and committed to the state's jail within the county of Cumberland, and afterwards released therefrom upon entering into another recognizance, with sureties for his appearance before said court, at this term. The said requisition, and subsequent proceedings, were founded upon the same indictment, on account

of which the recognizance, which constitutes the foundation of this action, was given and entered into. The defendants were defaulted upon the recognizance, at the time alleged in the writ.

Nathan D. Appleton, Attorney General, for the state.

1. The recognizance is a contract, entered into by the defendants, upon *condition* that the same should be void in case the condition was performed. The condition not being fulfilled the contract became absolute.

The defendants forfeited their recognizance. Burnham was bound to appear personally, and to remain until discharged, and a default in this respect was a forfeiture of the recognizance. Comyns' Dig., Bail O; *Commonwealth* v. *McNeill*, 19 Pick. R., 127; *The People* v. *Stager*, 10 Wend. R., 431.

2. This action was not commenced till December 25, 1855, long after the default of the defendants, and one court had intervened; and the *evidence offered* of the requisition upon the Governor of New Hampshire for said Burnham, and his arrest and commitment to jail, and release on his giving another recognizance, are legally *inadmissible* in this case.

This evidence has no tendency to justify or excuse the non-performance of the condition of the recognizance, nor to prove any legitimate defence. Comyns' Dig., Bail Q, 2, 5, 6, 7; Davies' Mudgt. 5, ch. 150, ss. 1, 2; *Commonwealth* v. *Johnson*, 3 Cush. R., 454.

3. The writ in this case is good, although it does not recite the *cause* for which the said Burnham was required to appear, as stated in the recognizance. It having been entered into before a court of record having jurisdiction of criminal matters, it will be presumed to have had jurisdiction of the offence charged in this case.

But if not, as the recognizance is before the court, and that shows the cause for which Burnham was holden to appear, if necessary, the court will permit the writ to be amended, and thereby sustain the proceedings; the omission

in the writ being merely a circumstantial error or mistake in drawing it, which may be properly corrected, by the provisions of the statute allowing amendments. R. S., ch. 115, s. 9.

4. The only power which the court has in the case, is that given by the R. S., ch. 169, s. 17, by which it is authorized, by petition, to remit the penalty, or such part of it as may be deemed proper.

R. P. Tapley, counsel for the defendants.

1. There is a variance between the declaration and the evidence submitted under it. The evidence submitted does not support the allegations.

2. The declaration describes a recognizance, the condition of which is materially different from that introduced in evidence.

The declaration describes one, the condition of which was to personally appear, &c., "to answer to all such matters and things as *should be* objected against him on behalf of said state." The paper introduced is conditioned to personally appear, &c., "to answer to all such matters and things as may be objected against him in behalf of said state, and *especially to an indictment found against him, and now pending, in said court, for perjury.*"

Here is a very material difference. That mentioned in the writ applies to such matters as *may be* objected against him, while that in evidence applies to such as *may be*, and also such as has been, to wit: an indictment for perjury, *now pending in said court.* The principal thing for which it was entered into was the indictment; the condition is, "and especially" to answer to this indictment for perjury.

3. There was a surrender made before service upon the defendant, Burnham, and accepted by the state.

The report shows that prior to the service upon Burnham. certain proceedings were had, by which the defendant was arrested and taken into the custody of the plaintiffs; that these proceedings were had upon the indictment, upon which the recognizance introduced was given.

It is proper to notice that these proceedings were had upon the *same process* for which the recognizance was taken, and to accomplish the same purpose.

He was committed to the state's jail, and there remained, and was there held until he gave a new recognizance.

The government say it was too late for the sureties to surrender their principal, and that all the court can do for us is to remit a part or the whole of the penalty under the provisions of the R. S., ch. 169, s. 17. To sustain this position he quotes from the case of *Commonwealth* v. *Johnson*, 3 Cush. R., 454.

In this matter the learned counsel must have overlooked ch. 161 of the Laws of Maine, passed in 1845. By this statute the sureties may surrender after default, at any time before final judgment, on *scire facias*. The case of *Commonwealth* v. *Johnson* has no applicability to the case at bar.

We have still another view of this proceeding on the part of the government. Every recognizance entered into is in view of the then existing laws of the place where the contract is made, and consequently those laws became a part of the contract, so far as they are applicable to them.

In this instance the contract was made with the right, on the part of the sureties, to surrender the principal, under the provisions of the statute of 1845. It was a part of the contract between the state and the defendants. The state would have no right to withdraw this statute from their aid, and thus impose upon them a more onerous burden than they originally assumed.

By the proceedings mentioned in the report, the plaintiffs did prevent the sureties from making a surrender in any different manner than that by which it was done.

The plaintiffs suggest that the writ may be amended if it is found there is a variance between the allegations and proof. This is no time to ask for amendments. No amendment can be of any avail except to describe a contract not now described. To abandon one fully set out, and then set out another. When an action is brought on the recognizance

introduced in evidence we will endeavor to meet it by suggestions that are not embraced in this brief. Until it is sued we need go no farther than we have.

One other variance we notice. The recognizance introduced is on the penal sum of two thousand dollars. That declared on in the writ is *two thousand hundred dollars.* This may be a circumstantial error possibly. In ordinary times we should consider it no very small circumstance. In these times we should consider it a pretty important enlargement of our liabilities.

Attorney General, in reply.

1. The first objection made by the counsel for the defendants, is, that there is a *variance* between the declaration and the recognizance, in the *place* where the latter was entered into. The recognizance purports to be taken "at the Supreme Judicial Court, *begun* and holden at Auburn, within and for the county of Androscoggin, on the fourth Tuesday of January, 1855. But no suitable buildings having been provided, at said Auburn, for the accommodation of said court, adjourned to be *held* at Lewiston, in and for said county, and there held accordingly." The court met at Auburn, and for want of suitable accommodations immediately adjourned to Lewiston, where the business of the court was transacted.

The next objection is similar to the first, and alleges that there is a material difference in the condition of the recognizance declared on and that produced. This is no such variance as will vitiate the proceedings in this case. It is a formal error, and amendable by our statute, ch. 115, s. 9.

2. This being a *judicial* writ, is amendable, as of course. There being the record to amend by, the court will look into the record, and if there be any error or mis-recital, will correct it, as a matter of course. *McGee* v. *Barber*, 14 Pick. R., 212; *Campbell* v. *Stiles*, 9 Mass. R., 217; *Young* v. *Hosmer*, 11 Mass. R., 89; see also the R. S., ch. 171, s. 30.

The proceedings under the Governor's requisition was a mode of obtaining the person of Burnham, and making him

answer to the indictment, provided by law, wholly unconnected with this requisition.

The statute of 1845, which is so much relied upon by the defendant's counsel, can afford them no relief.

The action, therefore, can be maintained consistently with the rules of law, the defendants having the right only to be heard in damages, as agreed by the report, and provided for by the statute, ch. 169, s. 17.

APPLETON, J. The act of 1854, ch. 60, incorporating the county of Androscoggin, was to take effect March 31, 1854. By s. 12, the legal voters were to decide which of three towns should be the shire town, and the governor being certified of the fact, was to make proclamation accordingly. The vote of the people determined that Auburn should be the shire town, and proclamation to that effect was made by the governor, and by these proceedings Auburn became the shire town, before January, 1855. It was further provided by the same section, that "until the shire town shall be permanently designated as aforesaid, Lewiston shall be the shire town, and the courts shall be there held *until suitable buildings* are prepared." Auburn having been designated the shire town, and arrangements having been made there for the accommodation of the court, the January term of this court, 1855, was commenced at that place, but the *buildings* for its accommodation not being *suitable*, in the opinion of the presiding judge, the court was adjourned to Lewiston, where the August term preceding had been held, and where better accomodations and more suitable buildings were provided.

The recognizance shows that the adjournment was made in pursuance of the authority given by the statute.

The recognizance must be regarded as valid, as "it can be sufficiently understood from its tenor," and it was taken by a court having jurisdiction to take the same. R. S., ch. 171, s. 30.

A recognizance is a contract entered into by the recog-

nizors, on certain conditions therein specified. That contract was broken before the institution of this suit. Nothing has occurred since its commencement by which it can be legally defeated.

The requisition by the governor of this state upon that of New Hampshire, by virtue of which the principal defendant, Burnham, was brought from New Hampshire and lodged in jail in Portland, and the new recognizance then taken, were since this action was commenced. This evidence may be properly admissible in a hearing on petition before the court, under the provisions of R. S., ch. 169, s. 17, but it cannot be regarded as a bar to the action. A similar question arose in *The People* v. *Annable*, 7 Hill, 33, when in debt on a recognizance, conditioned that the defendant should appear and answer to an indictment found against him, the defendant pleaded that *after* the forfeiture of the recognizance, and *before* the commencement of the action, he was arrested upon a bench warrant issued upon the same indictment, and that he thereupon entered into another recognizance to appear and answer, the condition of which he fully kept and performed, and it was held that the matters stated in the plea constituted no defence. "In the case of *The People* v. *Bartlett*, 3 Hill R., 570, we held," remarks NELSON, C. J., in *The People* v. *Annable*, "that an imprisonment of the accused in another county, on a criminal charge, until *after* the day of appearance, excused the default. So in the case of *The People* v. *Sager*, 10 Wend. R., 431, it was held that an arrest on a bench warrant upon the same indictment, *before* the default for appearing, would discharge bail. But there is neither authority nor principle for the position that a *subsequent* arrest and discharge can work any such consequence." In the present case the recognizance had become forfeited, and the action of the government, by which the presence of the principal was procured, was rendered necessary by his avoidance.

It is insisted by the act of 1845, ch. 161, which provides that "whenever there is a forfeiture of a recognizance in a

criminal case, the bail may *surrender* the principal in court at any time before final judgment, on *scire facias*, and deliver him to the order of court," and "paying all the costs of *scire facias*, said bail shall be discharged," that the defendants should be relieved from their contract, because the principal has been in custody since the commencement of this suit, so that it was out of the power of the bail to surrender him, and because such an act would be simply nugatory, he having been committed to and being in jail. The defendants establish no defence, because they have not paid the costs, nor offered to do so. The case is not therefore brought within the principle of *Warren* v. *Gilman*, 11 Cush. R., 15, even if that be applicable, where it was held that sureties on a bail bond are discharged by a commitment of the principal on an alias execution, although a *scire facias*, commenced after a release of *non est inventus* upon the first execution, be pending at the time of such commitment, as in that case the costs of the *scire facias* had been paid.

There are variances between the writ and the recognizance which have been pointed out, and which, if not amendable, would be fatal. But by R. S., ch. 115, process is not to be abated nor judgment arrested "for any kind of circumstantial error or mistakes, when the person or case may be rightly understood." There is no difficulty in understanding the cause of action in the present case, and the writ may be amended upon terms, so as to obviate the objections taken as to variance between the writ and recognizance. *State* v. *Folsom*, 26 Maine R., 209.

The plaintiff may amend upon relinquishing costs up to the time of the amendment, and in that event a default is to be entered, and the defendants may be heard upon a petition for the remission of the penalty, in whole or in part, under R. S., ch. 169, s. 17, if they desire.

COUNTY OF OXFORD.

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AMMI R. MITCHELL, *in Equity, versus* OLIVE R. BURNHAM.

It is not necessary, in order to constitute a mortgage, that there should be any collateral or personal security for the debt secured thereby.

A bill in equity to redeem a mortgage which had been assigned and transferred, with due notice to the plaintiff, should be brought against the assignee; and to him the tender made and upon him the demand for the rents and profits, although the deed of assignment may not have been recorded; but where the assignment has not been recorded or notice of it given, the tender may well be made, and notice to account for the rents and profits given, to the mortgagee; and payments made to him without notice or record of the assignment will be upheld in payment of the debt.

An assignment of a mortgage is a deed by which the interest of the mortgager is transferred, and a Court of Chancery will interfere to protect equitable rights not cognizable at law.

The complainant alleges, that, on May 16, 1844, Benjamin H. Harnden was seized in fee of the described land, being his homestead in Denmark. On that day he conveyed the same to Benjamin Harnden, in mortgage, conditioned for the maintenance and support of the said Benjamin and other persons, as specified in said mortgage and in said bill.

The contingencies, upon the happening of which said Benjamin H. was to be exonerated from the support of the persons named in the condition of said mortgage, had happened before the filing of the bill, as to all the persons, except Betsey Harnden.

That on the 10th day of August, 1846, Benjamin H. Harnden, then in possession of the land, conveyed the premises to John Jameson.

That on the 8th day of February, 1851, John Jameson

conveyed the premises to the complainant. By force of which the plaintiff claims the right to redeem the premises.

That on the 30th day of March, 1850, Benjamin Harnden brought a writ of entry upon said mortgage, against said Benjamin H. Harnden, and on the second Tuesday of October, 1851, conditional judgment was recovered upon said mortgage, in said suit — damages assessed by the court at $250, and costs $84,31.

That writ of possession was issued February 14th, 1852, which was served February 24th, 1852, and recorded March 13th, 1852.

That Benjamin Harnden thereupon went into possession.

That on the 2d day of May, A. D. 1853, Benjamin Harnden, by deed, conveyed the premises to the said Olive R. Burnham. Said Betsey Harnden executed the same deed, in token of her relinquishment of dower.

That since February 24th, 1852, said Benjamin was in possession, till he sold to Olive R. Burnham, and since that, she has been in possession, to the date of the filing of the bill, receiving rents and profits.

That the rents and profits have been more than sufficient to pay the expenses of support and services, in the condition of said mortgage mentioned.

That on January 13th, 1855, complainant called for an account of rents and profits, and the amount due upon said mortgage, of Olive R. Burnham, and offered to pay what was due, for the redemption of the premises. She declined rendering an account. He then, on the same day, tendered her $404, in satisfaction of what was due upon the mortgage, for debt, interest and costs, and one dollar more for deed of release—in all, $405, all in American gold—offering, at the same time, to pay any other sum which she should show to be due. She accepted and took the money, but refused to convey or deliver possession of the premises.

The prayer is for an account of rents and profits, and to be permitted to redeem, and for other relief.

In the amendment, after answer filed, the complainant makes Jane Osgood a party defendant, and alleges, that there was, in fact, no conveyance of said premises from said Olive R. Burnham to said Jane Osgood, that he had no notice of any, and none was recorded in the Oxford Registry.

The answer of Olive R. Burnham admits the title of Benjamin H. Harnden, on May 16th, 1844, as alleged, and alleges that the same premises were previously, on the same day, conveyed to said Benjamin H., by said Benjamin.

She also admits the conveyances from Benjamin H. Harnden to John Jameson, and from said John Jameson to the complainant, as set forth in the bill.

She also admits the suing out of the writ of entry—the judgment, possession taken, and record made, as set out by the complainant.

She also admits the conveyance to her from said Benjamin Harnden, as set out in the bill.

She alleges that on March 30th, 1854, she conveyed the premises to Jane Osgood, wife of James Osgood, and all her right and interest therein, and that the complainant has ever since had actual notice thereof, and that since said conveyance she has not had, and has not claimed, and does not now claim, any right, title or interest in the said premises, but disclaims all right, title and interest in and to the same.

She denies that she and Benjamin Harnden have had possession, and taken the profits and rents, as alleged by the complainant, and says that since March 30th, 1854, Jane Osgood, with her husband James Osgood, has been in possession, and said Olive has had no interest therein. She also alleges, that while said Benjamin Harnden and said Olive were in possession of the premises, they did not take the rents and profits, but the same were taken by the complainant.

She also admits that Benjamin Harnden, deceased September, 1854, Sabra Harnden, deceased February, 1853. Olive

and Hannah Harnden have each married, and Frances Jane B. White attained the age of fourteen years October 25th, 1853.

She denies that rents and profits have been received more than sufficient for the support and services mentioned in the condition of said mortgage—and alleges that she, by her personal services, from February 24th, 1852, supported and maintained said Benjamin and Sabra, until their respective deaths, and has supported and maintained the said Betsey and Frances J. B. White to the time of answer.

She admits that S. C. Strout, acting as attorney for the complainant, February 13th, 1855, tendered her $405, in the manner and for the purposes set out in the bill.

She also alleges that she declined accepting said money, but that said Strout, against her consent, left it in her house.

She admits that she did not deliver possession to the complainant, or release the premises to him; but alleges, that, at the time of the tender, she was not mortgagee, or a person claiming under the mortgagee, of said premises, and had no right, title, interest, demand or possession in the premises.

The complainant's bill, after the said amendment, was served on said Jane Osgood, and taken *pro confesso* against her, at the March Term of the Supreme Judicial Court for Oxford County, 1856.

Copy of condition of Mortgage. Provided, nevertheless, that if the said Benjamin H. Harnden, his executors and administrators, shall at all times, during the natural life of the said Benjamin Harnden, my father, and Betsey Harnden, wife of the said Benjamin Harnden, my mother, well and truly and sufficiently support and maintain the said Benjamin Harnden and Betsey Harnden, above named, in the house they now live in, and in case of the loss of the present house, in an other on the same farm, and them provide with meat, drink, clothes, nursing, medicine, and all other things necessary and convenient—to provide them with a horse and carriage, and spending money, whenever it is necessary

—to provide house and home for my three sisters, to wit: Sabra, Olive and Hannah Harnden, whenever they are at my house, until they shall get married—the above named persons are to manage, labor and do for the benefit of the family and parties above named, when they are in health and able, as they have usually done for years past. Said Benjamin H. Harnden is to keep and support, both summer and winter, five sheep, for the particular use and benefit of his mother, Betsey Harnden, the income of said sheep to be hers during her natural life, and at her decease said sheep to be his property. Frances Jane B. White is to have a home and living with the said Benjamin H. Harnden till she arrives at the age of fourteen years, the said Benjamin H. Harnden to pay no debts of his father contracted prior to this date, except a note given by us both to Cotton Lincoln.

Now, provided, if the said Benjamin H. Harnden, above mentioned, shall well and truly observe, keep, do, pay and perform all of the above covenants and stipulations, above written, according to the true meaning and intent of the parties above mentioned, this deed to be null and void; otherwise shall remain in full force and virtue.

Deposition of Ammi R. Mitchell, plaintiff. He states, that Benjamin Harnden remained in possession of the premises mentioned in the bill, from the time the writ of possession was served until he died. That said Mitchell made provision for the maintenancce of said Benjamin, and other persons mentioned in said condition, after possession was taken by Benjamin—went up to see them, offered aid in carrying on the farm, or in their support—also spoke to Timothy C. Pierce and Abner S. Harnden, and requested them to see that Benjamin and his wife should not want for anything to make them comfortable, and he would pay the bills. Had such conversations at different times, and in fulfillment of these assurances afterwards made an arrangement with Benjamin H. Harnden to carry on the farm for them—sent up to him provisions for them—often heard from Benjamin and

wife expressions of satisfaction with these arrangements and the supplies rendered. Benjamin, senior, at different times, told him he was perfectly satisfied with this arrangement, and with the way things were going on.

Thinks the income of the farm was more than enough for the support of the persons named in the condition of said mortgage, according to its terms.

That he never received any rents and profits of said farm, except about $30, at one time, for some hay. The farm and the rents and profits were under the control of the said Benjamin, and have never been under the control of deponent.

That he never had any notice or knowledge, in any way, or from any source, prior to the filing of said Olive's answer, that she had conveyed her interest in said farm to Jane Osgood, or any one else.

That since Jameson conveyed to him, he has paid all the taxes, money and highway.

That in January, 1855, he employed Sewall C. Strout to redeem the mortgage above mentioned, from Olive R. Burnham aforesaid, and furnished said Strout funds and gave him instructions in reference to the same.

Deposition of Sewall C. Strout. Deponent states that in January, 1855, and prior to the 13th, he was employed by the complainant to see Mrs. Olive R. Burnham, one of the defendants, and redeem from her the mortgaged premises mentioned in the bill. The complainant furnished funds for that purpose.

That, at his suggestion to the complainant, on the 10th day of the same January, as he thinks, deponent went to Fryeburg, for the purpose of examining the records, to ascertain if said Olive R. Burnham had conveyed her interest to any one.

That the records contained no conveyance from said Olive, of said premises, to any one. Deponent immediately returned to Portland, and on the next morning, which was January 13th, he went to Saco, to see Mrs. Burnham, aforesaid. Saw her at her shop, and told her that he was acting for Mr.

Mitchell, the complainant, and wished, for him, to redeem said mortgage. That he asked her for an account of the rents and profits of the farm, and of the amount due upon the mortgage. That she declined giving either.

That deponent told her if she did not do that, he should make her a tender; if she would do it, that he would pay her the amount, and save litigation. That he endeavored to compromise and adjust the matter, but without effect.

That said Olive told him, in the course of the conversation, that Betsey Harnden, her mother, had been stopping at Saco with her, and was there then, and she was supporting her there.

That deponent told her he had examined the records at Fryeburg, and ascertained that the title of Benjamin Harnden, the mortgagee, was then in her,—to which she assented. That she then spoke of the land as hers, and throughout the conversation treated it as hers, subject to the right of redemption. In no part of the conversation did she tell him she had conveyed away her interest, or say anything from which he could infer that she had.

That deponent never understood from her, in any way whatever, or from any one else, that she claimed to have conveyed away her interest, until he saw the answer she filed in this suit.

That afterwards, on the same day, (January 13th,) for Mr. Mitchell, and of the money furnished by him, he tendered to her $404, to redeem said premises, specifying, at the same time, the parties to said mortgage, and the land, and one dollar more for a deed of release, being $405 in all,—all of which was American gold coin. At the same time he offered to pay her any further amount, if any, which she would show to be due upon said mortgage, upon giving an account.

That she at first declined to accept the money, but, after consultation, she said she would take the mony, and reached out her hand; and deponent placed the same money in her hand, and then left.

Howard & Strout, solicitors for the plaintiff.

The plaintiff is the owner of the equity of redemption, in the premises described, and he alleges that the defendant, Burnham, holds the interest of Benjamin Harnden, the original mortgagee.

Benjamin Harnden, the original mortgagee, entered for the purpose of a foreclosure, February 24, 1852, under a judgment of court.

January 13, 1855, the plaintiff demanded an account of Mrs. Burnham, which she declined to render, and afterwards, on the same day, he tendered her four hundred and five dollars, for the redemption of the mortgage, which was the amount of the conditional judgment, with interest and costs; and offered to pay any further sum she would show to be due, upon the mortgage. This money was accepted by Mrs. Burnham, and has been retained by her.

The plaintiff's bill was filed February 15, 1855.

Mrs. Burnham, in her answer, disclaimed all title and interest in the premises, and alleged a previous conveyance by her to Mrs. Osgood, the other defendant.

The plaintiff amended his bill, after Mrs. Burnham's answer is filed, by making Mrs. Osgood a party, and alleging that no such conveyance, as alleged by Mrs. Burnham, was ever made to Mrs. Osgood; that no such conveyance was ever recorded, and that the plaintiff never had any notice of any such conveyance.

The bill, as amended, after service upon Mrs. Osgood, was taken *pro confesso* against her at the March term, 1856.

These facts appear in the bill, answer and proofs in the case.

Upon these facts, we claim that the plaintiff is entitled to redeem, according to the provisions of R. S., ch. 125, ss. 16 and 17.

T. A. Hayes, solicitor for the defendant.

The plaintiff is not entitled to the decree he asks, because

I. The deed from Benjamin H. Harnden to Benjamin

Harnden, of May 16, 1844, was *not a mortgage deed*, but a conditional deed, to become void upon the performance of certain conditions, which have *never been performed.*

A mortgage is the conveyance of an estate, by way of pledge, for the security of *debt.* 4 Kent's Com., 134.

There was no *debt* from B. H. Harnden to Benjamin Harnden—no note, bond, or evidence of indebtedness of any kind. He was under no obligation to perform the acts enumerated in the condition of his deed to his father. He never even *promised* to perform those acts. No action could have been enforced against him for omitting their performance. He was at liberty to perform, or omit to perform. If he elected to keep the condition of the deed, he would thereby secure the estate to himself absolutely. If not, he would fail to secure it.

This was the probation of the younger Harnden. The father owned the farm. He conveyed it to the son, and on the same day, as a part of the same transaction, he took the deed described in the bill, not as security for a debt, but to test the worthiness of the son to become his successor to the homestead farm.

Almost all the details of the condition exclude the idea of indebtedness.

II. But if the deed from B. H. Harnden to B. Harnden was a mortgage, the plaintiff is not entitled to redeem, because

1. Betsey Harnden is not a party to this bill in equity.

She is interested in the mortgage. *Pike* v. *Collins*, 33 Maine R., 38; and should have been made a party to the bill.

2. The mortgage cannot be redeemed during the life of Betsey Harnden, because one of its conditions cannot be performed fully until her decease.

She was to be supported, &c., during her natural life, and that, as appears from the bill and answer, has not terminated.

3. The tender was not made to the *mortgagee or person* claiming *under the mortgagee*, as is necessary by R. S., ch. 125, s. 17. *Wing* v. *Davis*, 7 Maine R., 31.

The bill was not brought in season to give the plaintiff the benefit of R. S., ch. 125, s. 16, but he must bring himself within s. 17 of the same chapter.

In the bill, as amended, it is alleged that the defendant, Burnham, is the person claiming under the mortgagee, and that there was no conveyance from her to Jane Osgood, and that the plaintiff had no notice of any.

The defendant, Burnham, in her answer, under oath, in direct response to these averments, declares, "that on March 30, 1854, she conveyed the premises to Jane Osgood, and all her right and interest therein, and that the plaintiff has ever since had actual notice thereof," &c.

To control this answer, there is no evidence against it, equivalent to the testimony of two credible witnesses, testifying to the contrary.

There is only the testimony of Mr. Strout, that he made a loose, unofficial examination of the records of Oxford county for a registry, and the statement, under oath, of the plaintiff, that he had no notice or knowledge. She also denies that she ever received the tender made by Mr. Strout.

The omission of the defendant, Osgood, to make answer and produce her deed, cannot affect the defendant, Burnham, especially when this omission was in consequence of a mistake of her counsel in Oxford county.

Howard & Strout, in reply:

The deed from Benjamin H. Harnden to Benjamin Harnden is a mortgage. It is in form a mortgage, and it is not necessary to the validity of a mortgage, that the debt or contract secured by the mortgage should be expressed in a separate paper. It may be in the instrument itself. *Smith* v. *People's Bank*, 24 Maine R., 185.

The remedy of the mortgagee, for a failure to perform the condition, by the mortgager, was by a foreclosure of the mortgage.

Benjamin Harnden treated the conveyance to him as a

mortgage—brought his action upon it, and took the conditional judgment, as of mortgage.

The second objection of the defendant is, that Betsey Harnden should have been a party. This was not necessary, because she was not a party to the mortgage, and there was no obligation from the mortgagee to her, to support her. She could maintain no action upon the mortgage. Her husband made provision for her in the condition of the mortgage, and took security for its performance to himself, and not to her. He held the title, and at most he was but a trustee in equity for her. Could he not release the condition? Betsey's remedy, if any, was in the name of her husband only.

The defendant, Burnham, holds the title of Benjamin Harnden, and if that title was charged with a trust in favor of Betsey Harnden, that trust still attaches to the estate in the hands of the defendant, Burnham, and she would be the proper person to represent and protect her interests.

The court may, by its decree, protect Betsey's interest, if she has any. *Austin* v. *Austin*, 9 Vermont R., 420.

Benjamin Harnden entered to foreclose for breach of the condition. The plaintiff seeks to redeem from *that foreclosure.*

The mortgage is still subsisting, and full performance cannot be made until the death of Betsey Harnden. Only a part of the condition of the mortgage has been broken. In such case the plaintiff may maintain his bill upon tender o performance of the part broken. *Saunders* v. *Frost*, 5 Pick. R., 259; *Wilder* v. *Whittemore*, 15 Mass. R., 262.

If the plaintiff is permitted to redeem from the breach for which Benjamin entered, the mortgage still subsists, so far as Betsey's rights are concerned, if she has any rights under the mortgage. The decree in favor of the plaintiff does not injure her, and if so, she need not be a party. Story's Equity Pleadings, 4th edition, s. 74, a; *Mann* v. *Richardson*, 21 Pick. R., 355.

But further, Benjamin Harnden obtained the conditional judgment upon the mortgage, October, 1851. The damages were then assessed by the court at $250 and costs. This amount remaining unpaid, he entered into possession on the 24th of the following February. The amount of damages and costs then became a debt due the mortgagee, and if any further breach occurred after the commencement of Benjamin's suit, and before May 2, 1853, the damages for such breach became an unliquidated debt. On the second day of May, 1853, Benjamin Harnden, by deed of warranty, conveyed these premises to the defendant, Burnham, and Betsey Harnden executed the deed in token of her relinquishment of her right of dower.

This conveyance was a transfer of the mortgage, and mortgage debt, and all rights under the mortgage. It transferred, therefore, to the grantee the claim for damages assessed by the court, and also all claim for damages for any breach between the commencement of the suit to foreclose, and the date of said Benjamin's conveyance.

Beyond this, Benjamin's deed conveyed nothing to Burnham, because the contract secured by the mortgage was for the support of certain persons. An assignment of such contract is a waiver and release of the contract, as to future support. The assignor cannot claim performance, after he has assigned his interest, and the obligor most certainly cannot be compelled to support any persons other than those named in the contract.

Hence Benjamin Harnden, on the second day of May, 1853, with the concurrence of his wife, released, by his deed to Burnham, all claim to future support under the condition of the mortgage, and therefore Betsey Harnden has no interest whatever in the mortgage; and the plaintiff is entitled to redeem, upon payment of damages for the breach before said second day of May.

But if the conveyance by Benjamin does not operate as a release to this extent, still it was an assignment of all their

claim to damages for the breach from which the plaintiff now seeks to redeem; and therefore Betsey need not be a party. *Bailey* v. *Myrick*, 36 Maine R., 50.

Pike v. *Collins*, cited on the other side, is not inconsistent with the foregoing views. We have been informed that Betsey Harnden has deceased. But, if this should not be true, still the plaintiff must have the right to redeem during her lifetime, because otherwise he could not redeem at all, as the estate would have become absolute in the defendant, Burnham, in 1855.

But if the court should think Betsey Harnden a necessary party, then we ask leave to amend, and make her a party.

The tender was made to Burnham, to whom the mortgagee had previously conveyed. It is not insisted that the tender was not sufficiently large. The testimony is, that the plaintiff never had any notice of a conveyance of the estate by Burnham to Osgood, and that the records of Oxford county show no such conveyance. They were examined immediately before the tender, for the purpose of ascertaining in whom the title of the mortgagee then was; and during all the conversation and negotiation on the day of the tender, between Mr. Strout and the defendant, Burnham, she made no statement and gave no intimation that she had conveyed her interest, but, on the contrary, spoke of it throughout as hers. And she then accepted the money tendered, and has retained it in her hands, or under her control, ever since. All this appears in the depositions of the plaintiff and Mr. Strout.

After Mrs. Burnham's answer, alleging a conveyance by her to Mrs. Osgood, the plaintiff amended his bill, and made Mrs. Osgood a party, and alleged that no such conveyance had ever been made, and, if made, that it was not recorded, and he had no notice of its existence. This Mrs. Osgood *admits*, by allowing the bill to be taken *pro confesso* against her.

And the answer of Mrs. Burnham is controlled by the testimony of the plaintiff and Mr. Strout, and the circumstances

of the case, from all which it satisfactorily appears, that no such conveyance had ever been made.

But if there had been such a conveyance, and the *plaintiff had no notice,* then the tender was properly made to Burnham, who held the record title. *Hubbard* v. *Turner*, 2 McLean, 519; *Hodgdon* v. *Nayler*, 4 Watts & Serg., 426.

But the bill was filed in season to allow the plaintiff the benefit of R. S., ch. 125, s. 16, and a tender was not necessary, as the defendant refused to render an account.

Benjamin Harnden took possession under his writ of possession, February 24, 1852.

The foreclosure began at that date. R. S., ch. 125, s. 3, first two paragraphs, and ss. 4 and 6 of same chapter, and ch. 105 of laws of 1849.

The foreclosure does not commence at the date of the judgment, or of the writ of possession, but at the time *actual possession* is taken under the writ of possession.

This bill was filed February 15, 1855.

Filing a bill in equity to redeem, is a commencement of the suit, and prevents the foreclosure becoming absolute. *Van Vronker* v. *Eastman*, 7 Met. R., 157.

The defendant, Burnham, admits the tender, but disclaims all right, title and interest to the premises.

She is not, therefore, in a position to resist the plaintiff's claim, or to object that Betsey Harnden should be a party. If her statement is true, a decree for the plaintiff cannot injure her, except perhaps as to costs.

APPLETON, J. A mortgage is a conditional conveyance of land, designed as a security for the payment of money, the fulfillment of some contract or the performance of some act, and to be void upon such payment, fulfillment or performance. To constitute a mortgage it is not necessary that there should be any collateral or personal security for the debt secured by the mortgage. *Smith* v. *Peoples' Bank*, 24 Maine R., 185. The deed, Benjamin H. Harnden to Benja-

min Harnden, of the 16th of May, 1844, by which provision is made for the support of the latter and of his wife and children, must be regarded as a mortgage, though in fact no bond may have been given.

It appears that Benjamin Harnden brought a writ of entry upon this mortgage, and recovered judgment thereon on the second Tuesday of October, 1851, upon which, subsequently, a writ of possession issued, under which an entry was made by him on the premises sought in this bill to be redeemed. After the rendition of judgment, and entry under the writ of possession, the mortgagee on the 2d of May, 1853, conveyed his interest in the mortgaged premises by deed which was duly recorded.

The complainant, through various mesne conveyances, having acquired the equity of redemption on the 13th of January, 1855, called on the defendant, Burnham, for an account of the rents and profits, which she declined to render; he therefore caused a tender to be made of an amount much exceeding that for which the conditional judgment had been rendered, and costs and interest thereon, and left the same in her hands. It does not seem to be contested that the sum then tendered was amply sufficient. As the mortgage had been assigned to, and as the title to the same appeared of record to be in her, the complainant, after such demand, refusal to account, and tender, has brought this bill for the purpose of redeeming the mortgaged premises.

The defendant, Burnham, against whom the bill was originally commenced, sets up by way of defence in her answer, the fact that she had, previously to the demand upon and tender to her, parted with all her interest in the mortgaged premises to Jane Osgood, upon whom the demand to account and to whom the tender should have been made, and that the complainant had notice of all these facts, and that consequently the bill cannot be maintained against her.

It may be conceded that if there was a valid assignment and transfer of the mortgage, and the complainant had due

notice thereof, his demand for an account of the rents and profits, and his tender should have been made to such assignee, and his bill brought against her, though the deed of assignment may not have been recorded.

The fact of notice to the complainant, which is asserted in the answer, is a material fact in determining the rights of the parties. The complainant, by the existing law of this state, is a competent witness, and he most explicitly denies all notice of the transfer of the mortgage.

No rule can wisely be established by which any judgment is peremptorily made of the trustworthiness of testimony in advance of its utterance, and in entire ignorance of its truth or falsity. Any such rule, if established, would afford about as safe a guide for the action of the court in judicial investigations of fact as the oracular utterances of the astrologer would for the conduct of life. The old rule of equity, that the answer of the defendant when responsive to the bill, is to be taken as true unless disproved by two witnesses or by a witness and corroborative circumstances, rests only on ill considered precedents, and wants the greater and more imposing authority of sound and enlightened reason. Its extension therefore is not to be favored. It existed when the complainant was not a witness. But now both parties being witnesses, causes must be determined by a careful comparison of their testimony, if they are the only witnesses, as in the case of a conflict of proof between witnesses who are not parties. The relative trustworthiness of the parties is to be determined by the tribunal before which the issue is raised. In the present case there is no proof that the assignment was recorded. The attorney for the complainant, in his testimony, states that after a careful examination of the records, he was unable to find any deed of assignment from the defendant, Burnham. If it had been recorded, and the record had been overlooked, it could have been easily shown. If not recorded, the complainant could only know by information of others. The defendant, Burnham, does not allege that she ever gave information to the complainant or to his coun-

sel of the assignment of the mortgage. There is no proof that he had notice thereof from any other source. The defendant does not assert that she ever gave notice or that any one else did, to her knowledge. The complainant denies it. Anxious to redeem, and having able counsel to aid him, he would not be likely to make a demand upon, or a tender to a person whom he knew had parted with the mortgage to be redeemed, nor would his counsel advise him so to do. The facts on proof, and the circumstances of the case, satisfy us that the complainant had no notice of the transfer of the mortgage to Jane Osgood, as is asserted in the answer.

The important question therefore arises whether the owner of an equity of redemption can legally make a demand upon or a tender to, or bring a bill in equity to redeem against the mortgagee or the assignee of such mortgagee, in whom the title to the mortgage appears of record, notwithstanding the mortgage may have been assigned, if he be in fact ignorant of such unrecorded assignment. In other words, is the assignment of a mortgage to be recorded, and is a demand upon and a tender to the mortgagee of record or the assignee of record, binding on the estate so far as to authorize the court to sustain a bill against him, and to compel the negligent assignee to release or discharge the mortgage, as the legal consequence of his neglect to have his assignment recorded?

A mortgage is an estate upon condition defeasible upon the performance of the condition according to its legal effect. *Erskine* v. *Townsend*, 2 Mass. R., 493. An assignment of a mortgage is a deed by which the interest of the mortgagee is transferred. A Court of Chancery will undoubtedly interfere to protect equitable rights not recognizable at law. By the common law, to enable an action to be maintained, the assignment must be by deed. *Parsons* v. *Wells*, 17 Mass. R., 419; *Wærden* v. *Adams*, 15 Mass. R., 233; *Peoples' Bank* v. *Smith*, 24 Maine R., 191. But as the mortgage is an interest in real estate, the assignment of a mortgage is the assignment of an interest in real estate, and must be recorded.

The assignment should be recorded equally with the mortgage. If not recorded it is in the power of the mortgagee and his successive assignees, by not recording the several assignments, to entirely defeat all attempts of the owner of the equity to redeem. The assignment not being recorded, he cannot know of whom to demand an account or to whom to make a tender, if it be necessary to make the same to an assignee of an unrecorded assignment. By a secret assignment, all efforts to redeem may be successfully prevented. As the assignment of a mortgage is a deed, it should be recorded like any other deed. It is apparent that such was the intention of the legislature. By R. S., ch. 125, s. 28, mortgages may be discharged by deed of release or by causing satisfaction and payment to be entered on the margin of the record, under the hand of the person authorized to discharge it. The record should show such authority. Unless the various assignments by which the state of the title can be shown to be in the person by whom the discharge is made, are to be recorded, it will not appear that the person discharging the mortgage had authority to do the act undertaken to be done. The due protection of the public requires that the assignment of a mortgage should be recorded equally with the mortgage thereby assigned.

The defendant, Burnham, having the apparent title to the mortgage, by the records, and the complainant having no notice of any transfer, the bill to redeem was properly brought against her.

The law seems well settled that payment to a mortgagee is good before notice of an assignment. *James* v. *Johnston*, 7 Johns. R., 417. In this case there was no notice by record, and there is no proof of notice in any other mode. Payment to an assignee is uniformly upheld in law as well as in equity, if made to the original payee without notice of transfer or assignment. Where a claim is assigned the assignee well knows that the contract was not made originally with him, and that the maker does not and cannot know without notice that payment is to be made to any person other than the one

with whom the contract was made. It has been repeatedly held that payment of a bond by the obligor to the obligee after the latter had parted with it by assignment to a third person, but before notice given thereof to the obligor, was good, and discharged the obligor from paying it again to the assignee. *Hodgdon* v. *Naglee*, 5 W. & S. R., 217; *Brindle* v. *McIlvarin*, 9 S. & R., 74.

Such is the unquestioned law between the original parties to a mortgage or any other contract. If there be an assignment and notice, the assignee stands in the place of the assignor, and consequently payment may rightfully be made to such assignee, and may continue to be made to him as to the original party until a new assignment is made and notice thereof is given. It follows, therefore, that if the mortgage was assigned by the defendant, Burnham, still the complainant might well make a payment to her, and should equitably be protected in such payment until there should be notice to him of an assignment by her.

The demand upon the defendant, Burnham, and the tender to her of the amount due, in the absence of all notice that she had parted with her interest in the mortgage, must be upheld. As all the prerequisites to the successful maintenance of the bill have been established as against the defendant, Burnham, it is not to be defeated by the allegation of an unrecorded assignment of which the complainant was ignorant.

The alleged assignee of the mortgage has been made a party. The bill, as amended, denies the existence of the alleged assignment. The proofs in the case show no such assignment. No exhibit thereof has been made. The defendant, Osgood, by permitting the bill to be taken, as confessed against herself, thereby admits that there is no deed of assignment under which she claims any rights adversely to the complainant.

The conditional judgment having been entered in the action Harnden v. Harnden upon the mortgage, the plaintiff, to be entitled to redeem, must pay such further sums, if any,

as have since accrued. *Mann* v. *Richardson*, 21 Pick. R., 355. The mortgage was given to the mortgagee, and for himself and others, for whose benefit he must be regarded as holding the mortgage in trust. It is asserted that all whose interests were secured by this mortgage have deceased. If so, the bill is properly between the present parties—otherwise, the *cestui que trusts*, if any should be made parties, so that no rights of theirs are injured or lost. The master to whom the amount between the parties is to be submitted, and by whom the amount to be paid is to be determined, if there is anything due, may likewise ascertain whether there are any persons protected by the mortgage and interested in its conditions still living, other than the parties to this litigation.

Upon the coming in of the master's report, a final decree, such as the equitable rights of the parties may require, will be entered up.

TENNEY, C. J., and MAY, J., concurred in the result.

WILLIAM C. WHITNEY *versus* MOSES HAMMOND ET ALS.

The statute of 1844, ch. 109, did not repeal any of the provisions of ch. 76, of R. S., by exempting manufacturing corporations from their operation; except upon the conditions therein named; and when by the statute of 1855, the remedy was changed to *scire facias*, it applied to such manufacturing corporations as should not comply with those conditions; and in an action against the stockholders of such corporation to recover a corporate debt, *scire facias* was the proper form of action.

And such action may be commenced as soon as the officer shall ascertain and certify upon the execution that he cannot find corporate property or estate, and before the return day of the execution.

The facts necessary to render a stockholder liable may as well be ascertained and certified upon the second execution as the first.

EXCEPTIONS to the rulings of GOODENOW, J.

This is a case of SCIRE FACIAS against the defendant, as stockholder in the South Paris Manufacturing Company.

And now, William Deering, one of the defendants, comes into court, and moves the court, that the writ and declaration should be quashed, abated and annulled, and for his costs, for the following reasons, appearing upon the face of the same.

1. Because the writ ought not to be a writ of *scire facias*, but the plaintiff's remedy, if any he have, ought to be by an action of the case, or of debt.

3. Because the writ was sued out before the return day of said second writ of execution, and so earlier than the same could be allowed him by law.

3. Because the officer did not make the certificate required by the R. S., ch. 76, s. 18, on the first execution issued on said judgment, and because it is not alleged that any officer did make such a certificate on said writ of execution.

Whereupon the presiding justice of this court sustained the motion, and ordered the writ abated, as a matter of law.

To which order and ruling the plaintiff excepts, and prays that his exceptions may be allowed.

Howard & Strout, counsel for the plaintiff.

The law of 1844, ch. 109, s. 3, (relating to manufacturing corporations) provides, that such proceedings may be had to enforce the remedy against stockholders as is provided in the R. S., ch. 76. The law of 1855, ch. 169, substitutes *scire facias* for the remedy provided by the R. S., ch. 76.

The reference, in the law of 1844, to the R. S., ch. 76, is a reference to that chapter as it then was, or may afterwards be amended. Same remedy against all stockholders in corporations. Since the law of 1855, to the date of this writ, the R. S., ch. 76, provides the remedy of *scire facias*.

The laws of 1856, ch. 271, repealing the laws of 1855, ch. 169, saves pending actions. This action was pending when the repealing act went into operation.

The certificate required to be made by an officer, by the R. S., ch. 76, s. 18, was made. There is no requirement that

it should be made upon the first execution, or at any particular time. *Gross* v. *Hilt*, 36 Maine R., 22.

The return mentioned in the laws of 1855, ch. 169, is the return or certificate of the o cer on the back of the execution, and not its return to court. R. S., ch. 76, s. 18; *Gross* v. *Hilt*, before cited.

The R. S., ch. 76, ss. 19 and 29, authorize a suit before return day of the execution. *Gross* v. *Hilt*, before cited.

J. C. Woodman, counsel for William Deering, one of the defendants.

The action was not maintainable in the form of *scire facias*, and was properly abated on that account.

The action is brought on the R. S. of 1841, ch. 76, s. 30, and on no other section of that, or any other, statu

The writ alleges, that "the South Paris Manufacturing Company was created a corporation by the legislature of the state of Maine, since the seventeenth day of March, in the year eighteen hundred and thirty-one;" that the debt on which judgment was recovered by said Whitney, as aforesaid, was contracted by said corporation since the sixth day of February, 1836, to wit: on the eighth day of March, one thousand eight hundred and forty-nine;" that each of the defendants, at the time when said debt was contracted, was the owner of a certain number of shares in the capital stock of the South Paris Manufacturing Company, which he had acquired since the 24th day of April, 1839, in his own right, and that he did not hold said shares as executor, administrator, guardian or trustee. The charter shows that the corporation was not a corporation for literary or benevolent purposes. The facts above stated show that the writ was drawn on the R. S. of 1841, ch. 76, s. 30. That section prescribes no form of remedy. In such case the remedy is by an action of debt or an action of the case. R. S. of 1841, ch. 115, s. 21; *Houghton* v. *Stowell*, 28 Maine R., 215; 1 Chit. Pl., 101, 134. When this action was commenced the said 30th section had not been repealed. If, then, this action was brought on s. 30

aforesaid, and the remedy on s. 30 was an action of debt or an action of the case; as that section was not repealed the action ought to have been brought in the form of debt or case. *Scire facias* was not and is not a proper form of process to recover anything by force of the statute, save in those cases where it is specially provided The statute of 1855, ch. 169, provides a new section to take the place of ss. 19 and 20, in the 76th chapter of the R. S. of 1841—a new remedy to recover on s. 18, in the same chapter. But this action was not brought on s. 18, and so the new remedy of *scire facias* did not apply.

2. Again, *scire facias* was not the proper remedy, because the corporation was a manufacturing corporation. If this action was not brought on s. 30 of the 76th chapter of the R. S. of 1841, it was not rightly brought on s. 18, and the new s. 19, enacted in 1855, of the same statute, because the corporation was a manufacturing corporation. On certain conditions, manufacturing corporations and their stockholders were entirely exempted from the liability to double up imposed by the R. S. of 1841, ch. 76, s. 18. See statute of 1844, ch. 109, s. 4. If those conditions were not complied with, the stockholders of manufacturing corporations were made liable to a much heavier burden, namely: the burden of paying all the debts of the corporation in full. Statute of 1844, ch. 109, s. 3. By this action of the Legislature in 1844, so far as manufacturing corporations were concerned, the burdens upon their stockholders provided by the R. S. of 1841, ch. 76, ss. 18 and 30, were entirely abrogated and superseded. On one condition the burden was removed, and on another it was increased.

When the Legislature of this state has revised the subject matter of any statutes of Massachusetts, and enacted corresponding provisions, adapted to the wants of the people, the former statutes are to be considered as no longer in force, though not expressly repealed. *Towle* v. *Mariett*, 3 Greenl. R., 25 and 26.

A subsequent statute, revising the whole subject matter

of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former law. *Bartlett et al.* v. *King, Extr.*, 12 Mass. R., 545; *Henry Ashley, Appellant*, 4 Pick. R., 23; *Commonwealth* v. *Croley*, 10 Pick. R., 39; *Goddard* v. *Boston*, 20 Pick. R., 410.

So when the statute covers the whole subject of our English statute, it operates a repeal. *Mann* v. *Waite*, 1 Pick. R., 458.

But when some parts of a statute revised are omitted in the revising statute, they are not to be revised by construction, but are to be considered as annulled. *Ellis* v. *Page*, 1 Pick. R., 45; *Rutland* v. *Mendon*, 1 Pick. R., 155; *Blackburn* v. *Walpole*, 9 Pick. R., 103. When the statute imposes a new penalty for one offence, it repeals, by implication, so much of the former statute as imposes a different penalty. *Nichols* v. *Squire*, 5 Pick. R., 168; *Commonwealth* v. *Kimball*, 21 Pick. R., 376. These authorities are sufficient to show that the burden imposed upon stockholders by the R. S. of 1841, ch. 76, ss. 18 and 30, so far as relates to manufacturing corporations, were virtually abrogated and annulled by the statute of 1844, ch. 109. The law does not mean, after compelling the stockholders to double up, and thus pay part of the debts of the corporation, for each of them to be sued again, and compelled to pay *all the debts of the corporation, in full, or all the remainder of the debts in full.* By the statute of 1844 it makes each stockholder liable to pay all of the debts in full, on condition. By the R. S. of 1841, ch. 76, ss. 18 and 30, it never went further than to compel the stockholder, "in case of deficiency of attachable corporate property, to double up towards the payment of certain debts. But after one stockholder has been sued and compelled to pay all the debts in full, there cannot be any other debts left towards which he and the other stockholders may be compelled to double up. The establishment of the new and greater burden on the stock-

holder not only abrogates the former burden, but *removes all ground for it.* If it was the meaning of the law that the stockholders might be held to pay the whole amount of the debts of the corporation, and then to double up afterwards, or to double up first, and then to pay the whole amount of the debts of the corporation afterwards, then, as both liabilities or burdens were recoverable by an action of the case, both might have been sued for in one action.

The present liability of members of a corporation, in certain cases, for the payment of the corporate debts, depends solely on provisions of positive laws, which, like *penal statutes*, are to be construed strictly. *Gray* v. *Coffin and trustee*, 9 Cush. R., 192.

The statute of 1844, ch. 109, ss. 3 and 4, like penal statutes, ought to be construed strictly against the claims of the creditor, and liberally in favor of the stockholder, who stands in the place of the accused. For the statute imposes a heavy liability upon the stockholder, and that liability may arise from an act which the stockholder cannot prevent.

By s. 4. all such manufacturing corporations as shall observe the prohibitions and keep within the limits prescribed in the third section of the act, shall be exempted from the operation of sections eighteen and thirty of chapter seventy-six of the Revised Statutes. In the third section it is provided that "a compliance on the part of such companies with the prohibitions and limitations aforesaid, shall relieve the stockholders of such corporations from all individual liability for the debts of their respective companies; but if the debts of such companies shall at any one time exceed either of the limitations aforesaid, then the stockholders in such companies shall at once become liable, individually, for all the debts of their respective companies." Construing the statute strictly, the fourth section might not be held to exempt the stockholder from personal liability on a compliance with the conditions. That, however, is not material, for during the present argument, and for the hearing on this first point in the motion, it must be conceded that the corporation did not

comply with the conditions. Neither on this first cause in the motion do we claim to succeed under the first clause cited from s. 3. But we claim it under the second clause of s. 3. In that clause the legislature has fixed a new and heavier burden upon the stockholders of manufacturing corporations. Construing the statute strictly like a penal statute, we say this new and heavier burden must be considered a substitution for the former liability; and consequently an abrogation of the former liability, so far as the stockholders of manufacturing corporations are concerned; and that it cannot be the legislature intended to impose upon them two different burdens, and leave both in force at the same time. The language in each statute forbids the idea. The aim of each was to pay off the indebtedness of the corporation, and no such construction can be adopted, as to sustain the position that the debts, or any part of the debts, are to be paid twice. The true meaning of s. 4 of ch. 109, of the statute of 1844, must be this: "All such manufacturing corporations as shall observe the prohibitions and keep within the limitations prescribed in the third section of this act, shall be exempted from the operation of sections eighteen and thirty of chapter seventy-six of the Revised Statutes," as modified by the preceding section. The only burden now resting on a stockholder of a manufacturing corporation is the one provided in the statute of 1844, ch. 109, s. 3, as modified by the statute of 1850, ch. 157, s. 1.

What is the remedy for this new and increased liability? The statute says: "Such liability shall continue for the same period of time, and such proceedings shall be had to enforce the same against such stockholders, but without limitation as to amount, and also contribution between stockholders, as is provided in chapter seventy-six of the Revised Statutes;" (statute of 1844, ch. 109, s. 3;) but such proceedings may be hereafter provided and incorporated into ch. 76 of the R. S., by substitution, but such as "is provided" in that chapter *now*; (to wit: on the 21st day of March, 1844.) This clause gives the plaintiff the same remedy as the 76th chap-

ter of the R. S. gave *at that time.* If the action arises on s. 30, as we have endeavored to show, then it should have been in the form of debt, or an action of the case, as has been already shown. If the action arises on s. 18, then the remedy was by a direct levy of the execution on the property of the stockholder, or by an action of the case. R. S., ch. 76, ss. 30, 18, 19 and 20. These remedies do not depend upon the Revised Statutes, although they are the same as existed in the R. S. in March, 1844. But they are made, established and found in the statute of 1844, ch. 109. So if these remedies had been removed entirely from the R. S., they would still have existed in the statute of 1844. The above recited clause, from the statute of 1844, ch. 76, s. 3, incorporates, by reference, so much of the 18th, 19th, 20th and 30th sections of ch. 76 of the R. S., as fixes the forms of remedy and the limitation of time. It is made a part of the statute of 1844. *Foss* v. *Crisp*, 20 Pick. R., 123 and 124; *Adams* v. *Hill*, 16 Maine R., 219; *Lincoln* v. *Wilder*, 29 Maine R., 169; *Thomas* v. *Patten*, 13 Maine R., 329; *Lunt* v. *Holland*, 14 Mass. R., 151; *Prop.'s Ken. Purchase* v. *Tiffany*, 1 Greenl. R., 123. If a deed refers to a line or corner between A and B, the line or corner as *then* existing between A and B is adopted into and made a part of such deed by reference. Any change of the line or corner subsequently made by A and B cannot alter this corner as adopted into the deed by reference. It is adopted as it was at the time. So, in this case, the remedies adopted by the statute of 1844, ch. 109, were such as were provided by and existed in the R. S., ch. 76, at the *time* of adoption, (March 21st, 1844,) and not such as have been enacted in place of them since. Those remedies in the 18th section were by a direct levy of the execution or by an action of the case. For the case provided in the 30th section, the remedy provided in the R. S. was an action of debt or case. Under no possible circumstances did an action of *scire facias* lie, for any cause declared in the 76th chapter of the R. S. It is said that ss. 19 and 20, of the 76th ch. of the R. S., are re-

pealed, and a new section, 19, is provided by the statute of 1855, ch. 169. But the remedy in this case is not provided by the R. S., but by the statute of 1844, ch. 109, and that is not repealed.

The statute of 1844 says, "such proceedings shall be had to enforce the same against such stockholders, as is provided in R. S., ch. 76." The proceedings provided in R. S., ch. 76, were a direct levy of the execution on the property of the stockholders, or an action of the case. So the same proceedings were provided by the statute of 1844. Those forms having been adopted by the statute of 1844, must remain till they are stricken therefrom by an act of the legislature. It is said that those forms have been stricken from the 76th chapter of the Revised Statutes since. True, but they have not been stricken from the statute of 1844. So they are the only proper forms to be adopted against stockholders of manufacturing corporations. If the same remedies would have existed without enactment in the statute of 1844, it would not have been necessary to have enacted them in that statute, and they would not have been enacted in that statute. But without such enactment the creditor could not have had the same remedies. He could not have levied his execution directly on the property of the stockholder. This remedy, then, against stockholders of manufacturing corporations, was originally provided in the statute of 1844. Manufacturing corporations and their stockholders, by the 1st, 2d and 4th sections of chapter 109, of the statute of 1844, were taken out of the provisions of the 76th chapter of the Revised Statutes. So if the remedies provided in the R. S., ch. 76, had not been re-enacted in the statute of 1844, ch. 109, s. 3, the creditor could not have had them. He could not have levied his execution directly. The general principles of law would have given him an action of debt. R. S., ch. 115, s. 21.

So the 19th and 20th sections of the 76th chapter of the Revised Statutes might be repealed, and the statute of 1844, ch. 109, remain in full force, and stand good against manu-

facturing corporations and their stockholders. In such case the liabilities against stockholders of manufacturing corporations might remain, and in such a case the creditor might levy his execution directly upon the property of the stockholder, or proceed by an action of the case, because those provisions would still exist, by their re-enactment in the statute of 1844, ch. 109. And that is just this case. For these reasons the remedies enacted and established in the 3d section of the 109th chapter of the statute of 1844 remain, notwithstanding the 19th and 20th sections, and a part of the 18th section, of the 76th chapter of the Revised Statutes, have been repealed. If these remedies (an action of the case or a levy of the execution on the property of the stockholders) do not remain in spite of the repeal of the 19th and 20th sections of the 76th chapter of the Revised Statutes, the remedy would be debt under R. S., ch. 115, s. 21. For the repealing act (statute of 1855, ch. 169, s. 1,) substitutes a new section (19,) which is wholly inapplicable to stockholders of manufacturing corporations, and unsuited to carry into effect the liabilities imposed on them. Although this new section was enacted in 1855, it was to be incorporated into the Revised Statutes of 1841. Therefore it could not have been intended to repeal the statute of 1844, ch. 109. That statute still remains in force. The stockholder of a manufacturing corporation, under that statute, is not liable to double up. He is either liable to pay the whole of the creditor's debt or no part of it. That the remedy of *scire facias*, provided by statute of 1855, ch. 169, was not applicable to stockholders of manufacturing corporations, and not intended to apply to them, is evident. This statute provides that "in the execution issued upon any such judgment in *scire facias*, the proportion to be paid by each of said stockholders shall be specifically designated." But no such provision could be applicable or intended for stockholders of manufacturing corporations, because all of those sued would be liable for the whole or no part of the debt. Again the statute of 1855, enacting the new section, 19, for chapter 76

of the Revised Statutes, provides, that "in such action of *scire facias*, any defendant may prove in reduction of his liability, the amount of debt of the corporation he has previously paid, re-payment of which has not been made or secured to him, and may show any other legal cause why judgment should not be rendered against him." Now no such provision could be applicable or intended for stockholders of manufacturing corporations, because they are either liable for the whole debt or no part of it.

Moreover, by force of the statutory provisions, there arises an anachronism as to the order of these statutes. The present s. 19 of ch. 76 of the Revised Statutes, though enacted in 1855, is carried backwards, and takes date with the Revised Statutes on the first day of August, 1841. The proceedings for enforcing liabilities against stockholders of manufacturing corporations are the same as provided by the R. S., ch. 76; but these proceedings are authorized and established by the statute of 1844, ch. 109, s. 3. These proceedings being a direct levy of the execution on the property of the stockholder, or an action of the case, and being authorized or established in 1844, cannot have been abrogated or repealed by a statute which takes date on the first day of August, 1841. It is not possible, therefore, that the proceedings authorized by the statute of 1844, ch. 109, s. 3, has been abrogated. Nor can the liability against a stockholder of a manufacturing corporation be enforced by *scire facias*. The present s. 19 of ch. 76 of the Revised Statutes, though enacted in 1855, stands back among the statutes of 1841, prior to 1844, and so cannot act upon and modify the remedy provided by the subsequent statute of 1844.

3. But even if the action is rightly brought in the form of *scire facias*, there is another fatal objection which appears on the face of the writ. It is brought too soon. The writ alleges that the execution was issued April 2, 1856; that it was returned unsatisfied April 21, 1856; and the writ bears date April 30, 1856. By law this execution was returnable July 2, 1856; and for the purpose of commencing a *scire*

facias, could not be legally returned *unsatisfied* earlier, nor could a writ of *scire facias* issue on the judgment before that time. R. S.. ch. 115, ss. 103 and 105. *Adams et al* v. *Cummiskey*, 4 Cush. R., 420; *Niles* v. *Field*, 2 Met. R., 327; *Rowland* v. *Seymour*, 2 Met. R., 590. *Adams* v. *Cummiskey* was *scire facias* against a trustee, and the statutes appear to make the case perfectly analagous to this. The principal debtor has the life of the execution, before the auxiliary suit can be commenced. The action cannot be maintained on the return of the first execution, "because the officer holding the execution did not first ascertain and certify upon such execution, that he could not find corporate property or estate," as required by R. S., ch. 76, s. 18. And it cannot be maintained on the return of the second execution, because the execution was so returnable, and could not *be returned unsatisfied* for the purpose of commencing a writ of *scire facias*, before July 2, 1856, the day of return. The plaintiff refers to *Grose* v. *Hilt*, 36 Maine R., 22. *Grose* v. *Hilt* was an action of the case commenced on the R. S., ch. 76, s. 18, and before the statute of 1855, ch. 169, was passed. The 18th section of ch. 76 of the Revised Statutes did not require the execution to be returned unsatisfied before the auxiliary action of the case against the stockholder could be brought. So the case of *Grose* v. *Hilt* does not apply. The plaintiff's action is brought on statute of 1855, ch. 169. The plaintiff contends that the words "as aforesaid," in the new 19th s. of the 76th ch. of the Revised Statutes, as enacted in statute of 1855, ch. 169, limit the words, "after such execution shall have been returned unsatisfied," so that the execution may be returned before the return day, and that it merely refers to the certificate required in the 18th s. of the 76th ch. of the Revised Statutes. This new 19th section certainly requires the execution to be "returned unsatisfied." The execution could not be literally "returned unsatisfied, *as aforesaid*," because the previous section, the 18th section, did not require the execution to be returned unsatisfied, nor to be returned at all. Some interpretation must be made

upon the words "as aforesaid." It might be read, "After such execution shall be returned unsatisfied [upon the judgment] as aforesaid;" or the words "as aforesaid" may be rejected as a *lapsus permœ*. They cannot refer to any return of the execution unsatisfied, named in the eighteenth or previous section, because no return is named in said section. It will not do to dispense with the more important words, "*after said execution shall have been returned unsatisfied*," for the sake of the unimportant words, "*as aforesaid*." The latter must give way to the former. The statute of 1855 requires the execution to be "returned unsatisfied," and this is the uniform course, where *scire facias* issues. The R. S., ch. 76, did not originally require the execution to be returned. An action of debt may always be commenced before the return of the execution. The execution was required to be returned unsatisfied in this case, but could not be till July 2, 1856. Of course the action was prematurely brought.

That this is so, becomes more evident by a comparison of the old sections 19 and 20, in chapter 76, with the new section 19, enacted in 1855. That statute was made for the partial relief of stockholders. That new section allows the defendant to prove in reduction of his liability, the amount of debt he has previously paid for the corporation which has not been repaid to him; authorizes an adjustment of the debt in suitable proportions between the defendants, and allows the defendants to show any other legal cause why judgment should not be rendered against them. In these respects it is decidedly more favorable to stockholders than the old sections. Yet if this action is not prematurely brought, it is more unfavorable to the stockholders. For the old sections 18, 19, and 20 required that the officer holding the execution should give the stockholder notice of the same, and of his intention to levy on his individual property, and of the amount of deficiency, and then and only then, can the creditor (if the stockholder does not on such demand and notice disclose and show to the creditor or the officer

attachable corporate property or estate sufficient to satisfy said execution and all fees,) levy his execution on the property of such stockholder. In like manner the creditor, until after such demand and notice, by virtue of those sections can maintain no action of the case. But no such demand and notice is required before commencing a writ of *scire facias*, under the new section 19, enacted in 1855. So if the action can be commenced immediately before the return day of the execution, the stockholder may be put to cost sooner (and without giving him any notice at all,) under the new section made for his relief in 1855, than under the old sections of the Revised Statutes. When it is considered that this statute was made expressly for the relief of stockholders, as is manifest upon its face, we cannot believe that such a result was intended by the legislature, or that it is fairly to be inferred from their acts. The principle of strict construction forbids it. And the writ was commenced too soon.

4. These objections may be taken advantage of at any time on motion. *Martin* v. *Commonwealth*, 1 Mass. R., 357; *Osgood* v. *Thurston*, 23 Pick. R., 111, 112; *Clark* v. *Rook*, 15 Mass. R., 221; *Williams* v. *Blunt*, 2 Mass. R., 217; *Marine Bank* v. *Hervey*, 21 Maine R., 45; *Bailey* v. *Smith*, 12 Maine R., 196; *Tibbets* v. *Shaw*, 19 Maine R., 204; *Upham* v. *Bradley*, 17 Maine R., 426; *Greenwood* v. *Fales*, 6 Greenl. R., 406; *Guild* v. *Richardson*, 6 Pick. R., 369; *Brown* v. *Lyman*, 1 Pick. R., 32; *Hart* v. *Fitzpatrick*, 2 Mass. R., 512; *Cook* v. *Gibbs*, 3 Mass. R., 196; *Williams* v. *Hingham and Quincy Turnpike*, 4 Pick. R., 345; *Bartlett* v. *Crozier*, 17 John. R., 456; *Eustis* v. *Kidder*, 26 Maine R., 98; *State* v. *Lane et al.*, 33 Maine R., 538; 1 Chit. Pl., 229; *State* v. *Palmer*, 35 Maine R., 13.

DAVIS, J. The South Paris Manufacturing Company was incorporated by an act of the legislature, on the sixth day of February, 1836, and became indebted to the plaintiff in March, 1849. This debt remaining unpaid, the plaintiff com-

menced a suit upon it, and in November, 1855, recovered judgment against the company for the sum of $1358.18. Execution was issued upon this judgment against the corporation, December 26, 1855, which was returned "in no part satisfied." An alias execution was issued on the second day of April, 1856, and the same was returned April 21st, with the certificate of the officer thereon, that he had demanded payment of the president, treasurer, and one of the directors, and they severally had refused to pay; that they informed him that there was no corporate property or estate; and that he had made diligent search for and could find no such property to satisfy said execution.

On the 30th day of said April, the plaintiff sued out a writ of *scire facias* against the defendants, as stockholders in said corporation. This writ was entered, and the defendants appeared, at the August term of this court, in 1856. The action was continued from term to term, until March, 1857, when one of the defendants presented a motion in writing, that the writ be quashed. This motion was sustained by the presiding judge, and the plaintiff excepted.

The first point in the defendants' motion is, "that the plaintiff's remedy, if any, is not by *scire facias*, but by an action of the case, or of debt."

By the general statutes of this state the stockholders of all corporations are made individually liable for the corporate debts, to the amount of their several shares. The creditor, having recovered his judgment against the corporation, if unable to find corporate property to satisfy the execution, could levy the same upon the property of the stockholders; or he might have an action on the case against them. R. S., ch. 76, ss. 18, 19, 20. The two sections last named were repealed in 1855, and a section substituted providing for an action of *scire facias*. This act, and the preceding sections of the Revised Statutes, were repealed in 1856, and a new remedy provided. Whether this repeal did not discharge stockholders from all personal liability for corporate debts

previously contracted, it is not necessary for us now to determine; for this repealing act did not take effect until May 11, 1856, and pending actions were saved; and this action was commenced April 30, preceding, and was then pending. And in 1857 an act was passed relieving stockholders in corporations from all personal liability beyond the loss of their stock. This renders the questions submitted to us of little public importance. But the rights of the parties to this suit remain the same as when it was commenced—all debts previously contracted, and all pending actions, being saved.

This action was commenced when *scire facias* was the statute remedy; and it is correct in form, unless "manufacturing corporations" are made an exception by ch. 109 of the statutes of 1844. This act prohibits manufacturing corporations from contracting debts beyond a limited amount, in proportion to their capital invested. By complying with it, the stockholders are relieved from all personal liability for the corporate debts. But if any company contracts debts to a larger amount, the stockholders are made personally liable for all the debts—to be recovered in the same manner, and within the same time, as is provided in ch. 76 of the Revised Statutes.

It is obvious that the ground of the individual liability of stockholders in manufacturing corporations, under this statute, is, "that the debts of such companies exceed the limitations aforesaid." The presumption is, that all corporations comply with the statute; and their violation of it, in actions against the stockholders, is the gravamen of the charge, to be alleged and proved. Whether the plaintiff's action is well brought in this respect, is not a question raised by the defendant's motion.

But we are of opinion that the form of the action is right. The statute of 1844 was not designed to repeal the provisions of the Revised Statutes. The exemption of manufacturing corporations from their operation was only upon certain conditions. And when, by the statute of 1855, the rem-

edy was changed to *scire facias*, it applied to such manufacturing corporations as should not comply with these conditions of the statute of 1844. All statutes *in pari materia* are to be construed as they stand together at a given time, and "are to be taken together, as if they were one law." Lord Mansfield, in *Ailesbury* v. *Patterson*, Douglas, 30. And when the plaintiff commenced his suit, *scire facias* was the remedy then provided by the Revised Statutes, as amended.

The second point in the defendant's motion is, "that the writ was sued out before the return day of the execution." The statute authorizes the commencement of the action as soon as the officer shall "ascertain and certify upon the execution, that he cannot find corporate property or estate." R. S., ch. 76, s. 18.

The liability of a stockholder for the debts of the corporation is not analagous to the liability of bail in case of the avoidance of the principal; nor to the liability of a trustee who has been charged. The statute of 1841, R. S., ch. 76, s. 18, 19, did not, like the statute of 1856, require the execution to be returned unsatisfied before any proceedings against the stockholders. It manifestly contemplated that the stockholders should be liable upon the same execution upon which the officer had "first ascertained and certified that he could not find corporate property or estate." The certificate must necessarily in such case have been made before the return day. The statute, as amended, in 1855, was not changed in regard to the certificate required. As soon as such certificate was made, and the execution was "returned unsatisfied *as aforesaid*," then the right to an action of *scire facias* accrued. And this might be done before the return day of the execution. *Gross* v. *Hilt*, 36 Maine R., 22.

The third objection is, "that the officer did not make the certificate upon the first execution." The facts necessary to render the stockholders personally liable, could as well be "ascertained and certified" upon the second execution as upon the first.

Neither of the objections taken by the defendant being

valid, we are of opinion that his motion should have been overruled. The exceptions are therefore sustained.

MAY, J., having been counsel, did not sit at the hearing of this case.

CHARLES DECKER *versus* JAMES M. GAMMON.

If damage be done by any domestic animal kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief before, if such animal is rightfully in the place where it does the mischief.

If domestic animals are *wrongfully* in the place where they do any mischief, the owner is liable for it, though he had no notice that they had been accustomed to do such mischief before; and an allegation in the writ of such previous knowledge is unnecessary, and may be treated as surplusage.

When the declaration in a writ alleges that the defendant's horse, being unlawfully at large, broke and entered the plaintiff's close, and injured the plaintiff's horse, which was there peaceably and of right depasturing, it is sufficient to sustain a verdict for such injury.

This is an action on the CASE, to recover the value of a horse, alleged to have been injured by the defendant's horse, and comes forward on EXCEPTIONS to the rulings of GOODENOW, J.

The plaintiff introduced evidence tending to prove that at night, on the 13th of September, 1855, he put his horse into his field well and uninjured. The next morning, September 14th, his horse and the defendant's were together in his, the plaintiff's close, the defendant's horse having, during the night, escaped from the defendant's enclosure, or from the highway, into the close of the plaintiff, and that the plaintiff's horse was severely injured by the defendant's horse, by kicking, biting, or striking with his fore feet, or in some other way, so that he died in a few days after.

The defendant requested the presiding judge to instruct the

jury that to entitle the plaintiff to recover against the defendant he must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the alleged injury.

The presiding judge declined giving these instructions, and directed the jury, that, if they should find that the defendant owned the horse alleged to have done the injury to the plaintiff's horse, and if, at the time of the injury, he had escaped into the plaintiff's close, and was wrongfully there, and while there occasioned the injury, and that the horse died in consequence, that the plaintiff would be entitled to recover the value of the horse so injured. That it was not necessary for the plaintiff to prove that the horse was vicious, or accustomed to acts of violence towards other animals or horses, or that the owner had notice of such viciousness or habits.

The jury returned a verdict for the plaintiff.

C. W. Walton and *S. C. Andrews*, counsel for the defendant, argued in support of the exceptions.

Copy of Declaration. "In a plea of the case, for that the said plaintiff, on the 14th day of September, 1855, was possessed of a valuable horse, of the value of $125.00, which was peaceably and of right depasturing in his own close, and the defendant was possessed of another horse, *vicious and unruly*, which was running at large where of right it ought not to be, and being so unlawfully at large, broke into the plaintiff's close, at the time aforesaid, and viciously and wantonly kicked, reared upon, and injured the plaintiff's horse, so that his death was caused thereby, *which vicious habits and propensities were well known to the defendant at the time aforesaid.* To the damage, &c."

The very essence of the charge in the above, is that the defendant's horse was "*vicious and unruly*," "*which vicious habits and propensities were well known to the defendant*,"

and if these words were stricken out of the declaration, there would be no cause of action set forth in it.

Any person *injured in his land* by domestic animals, may recover his damages of the owner in an action of trespass *quare clausum fregit.* But such is not this form of action; and in this action no such damages are claimed.

So when a party is injured by the negligence of the defendant, he may in proper cases recover of the negligent and careless party. In this case, however, negligence is not even averred, and cannot, therefore, be the foundation of his right to recover.

The fact is, this action is brought, and the declaration framed, upon that rule of the common law which renders a man liable in case he keeps a vicious and unruly animal, after having knowledge of its viciousness. And the *injury*, the *vicious habit*, and the *knowledge*, are the essential facts in the case; and without proof of the two latter, the plaintiff cannot recover for the former.

This is not an action of trespass *quare clausum*, and the plaintiff complains of no injury to his close, describes no close, and does not allege that the injury complained of took place on land within the county of Oxford, as he would be obliged to do in an action of trespass for an injury to his land, that being a local action; and the plaintiff's counsel admitted in his argument, before the full court, that if he had brought such an action, the facts of the case would not have supported it. Neither is it an action based upon the carelessness or negligence of the defendant, as would be the case if he had left his horse in a public street unhitched and without a keeper. But it is just what it purports to be—an action on the case for keeping a vicious and unruly horse, *knowing* him to be vicious and unruly.

Vrooman v. *Sawyer*, 13 Johns. R., 339. Error to a justice's court. The plaintiff in the justice's court proved that the defendant's bull had gored his horse; but there was no evidence that the bull had ever before done similar acts, or

that he had ever before been unruly. The justice gave judgment for the plaintiff; but the Supreme Court for the correction of errors said:

"The judgment is clearly wrong. If damage be done by any domestic animal, kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief."

Buxendin v. *Sharp*, 2 Salk. R., 662. "The plaintiff declared that the defendant kept a bull that used to run at men; but did not say *sciens* or *scienter*, &c. This was held naught after verdict; for the action lies not unless the master knows of this quality, and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration."

Rex v. *Huggins*, 2 Ld. Raym., 1583. In noticing the different questions raised and discussed in the arguments, the court say: "There is a difference between beasts that are *ferœ natura*, as lions and tigers, which a man must always keep up at his peril, and beasts that are *mansuetae natura*, and break through the tameness of their nature, such as oxen and horses. In the latter case an action lies, if the owner has had notice of the quality of the beast; in the former case an action lies without such notice."

Jenkins v. *Turner*, 1 Ld. Raym., 109. This case turned upon the sufficiency of the declaration, in which it was alleged that the defendant's boar had been accustomed to bite animals, without stating what kind of animals. In the course of the discussion the court remarked, that "the judge who tried the cause knew well that this would not be actionable, unless that the boar had used to kill or bite horses, sheep, &c., and consequently if that had not been proved, he would not have permitted the jury to have given a verdict for the plaintiff."

Mason v. *Keeling*, 12 Modern R., 333. Chief Justice HOLT says: "If they [animals] are such as are mischievous in their kind, he shall answer for hurt done by them without any no-

tice; but if they are of a tame nature, *there must be notice of their ill quality.*"

May v. *Burdett*, 9 A. & E., N. S., 101, (58 Eng. Com. Law R., 99.) This case decides that *negligence* is not the basis of the action. That the basis or gist of the action is the keeping of the animal *after knowledge of its mischievous habits.*

Yet, in violation of these well established rules of law, and in the very teeth of the plaintiff's averments, the jury have been permitted to find a verdict for the plaintiff for the value of his horse, without proof that the defendant knew his horse to be vicious and unruly, and without proof in point of fact that the horse had ever before manifested any such propensity. The allegations in the plaintiff's writ, of the viciousness of the defendant's horse, and the defendant's knowledge of the fact, are material, and lie at the very foundation of his right to recover.

The judge in his charge to the jury, seemed to put the plaintiff's right to recover upon the supposition that the defendant's horse was wrongfully in the plaintiff's close. Our answer is, that the plaintiff's declaration and the defendant's plea of not guilty put no such question in issue. Suppose the defendant had pleaded specially that his horse was rightfully in the plaintiff's close at the time of the alleged injury. Would such a plea be any answer to the plaintiff's declaration? Would proof of the truth of such a plea bar the plaintiff's right to recover? The grounds of his complaint are the *vicious habits of the horse*, and *the defendant's knowledge thereof.* Whether the defendant's horse was rightfully or wrongfully there was not in issue, and is a question entirely irrelevant to the legal merits of this case. The plaintiff may yet bring an action for a breach of his close, and the defendant may contest the breach, and the judgment in the case at bar could have no influence upon such a suit.

Hence we say that the ruling of the presiding judge was clearly wrong, both in withholding the instructions requested by the defendant, and in the instructions given to the

jury; and that the exceptions ought to be sustained and a new trial granted.

The injury complained of in this case was the result of inevitable accident; and there are no principles of equity in favor of one party more than the other; and if the entire damage is to be borne by the defendant, rather than by the owner of the property to which the accident has occurred, it must be by virtue of some positive rule of law, and not otherwise.

T. Ludden, counsel for the plaintiff.

In an action on the case for negligence, the most general statement of the cause of action, if sufficient to put the defendant on his defence, is sufficient after verdict. *Taylor* v. *Day*, 16 Verm. R., 566.

In actions of tort the plaintiff is bound to prove no more of his declaration than is necessary to constitute a good cause of action. *Hutchingson* v. *Granger*, 13 Verm. R., 336; *Cook* v. *Champlain Tr. Co.*, 1 Denio R., 91; *Warren Litchfield*, 7 Maine R., 63.

The owner of a horse, who suffers it to go at large, is answerable for an injury done by it to any person, without proof that the owner knew the horse was vicious. *Goodman* v. *Gay*, 15 Penn. State R. (3 Harris,) 188.

An averment in a declaration, not required by law, is surplusage, and need not be proved. *Bean* v. *Simpson*, 16 Maine R., 49.

DAVIS, J. There are three classes of cases in which the owners of animals are liable for injuries done by them to the persons or the property of others. And in suits of such injuries the allegations and proofs must be varied in each case, as the facts bring it within one or another of these classes.

1. The owner of wild beasts, or beasts that are in their nature vicious, is, *under all circumstances*, liable for injuries done by them. It is not necessary, in actions for injuries by such beasts, to allege or prove that the owner knew them to

be mischievous, for he is conclusively presumed to have such knowledge; or that he was guilty of negligence in permitting them to be at large, for he is bound to keep them in at his peril.

"Though the owner have no particular notice that he did any such thing before, yet if he be a beast that is *feræ naturæ*, if he get loose and do harm to any person, the owner is liable to an action for the damage." 1 Hale P. C., 430.

"If they are such as are naturally mischievous in their kind, in which the owner has no valuable property, he shall answer for hurt done by them, without any notice; but if they are of a tame nature, there must be notice of the ill quality." HOLT, C. J. *Mason* v. *Keeling*, 12 Mod. R., 332.

"The owner of beasts that are *feræ naturæ* must always keep them up, at his peril; and an action lies without notice of the quality of the beasts." *Rex* v. *Huggins*, 2 Lord Raym., 1583.

2. If domestic animals, such as oxen and horses, injure any one, in person or property, *if they are rightfully in the place where they do the mischief*, the owner of such animals is not liable for such injury, unless he knew that they were accustomed to do mischief. And in suits for such injuries, such knowledge must be alleged, and proved. For unless the owner knew that the beast was vicious, he is not liable. If the owner had such knowledge he is liable.

"The gist of the action is the keeping of the animal after knowledge of its vicious propensities." *May* v. *Burdett*, 58 Eng. C. L., 101.

"If the owner have knowledge of the quality of his beast, and it doth anybody hurt, he is chargeable in an action for it." 1 Hale P. C., 430.

"An action lies not unless the owner knows of this quality." *Buxendin* v. *Sharp*, 2 Salk., 662.

"If the owner puts a horse or an ox to grass in his field, and the horse or ox breaks the hedge, and runs into the highway, and gores or kicks some passenger, an action will

not lie against the owner unless he had notice that they had done such a thing before." *Mason* v. *Keeling*, 12 Modern R., 332.

"If damage be done by any domestic animal, kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief." *Vrooman* v. *Lawyer*, 13 Johns. R., 339.

3. The owner of domestic animals, *if they are wrongfully in the place where they do any mischief*, is liable for it, though he had no notice that they had been accustomed to do so before. In cases of this kind the ground of the action is, that the animals were wrongfully in the place where the injury was done. And it is not necessary to allege or prove any knowledge on the part of the owner, that they had previously been vicious.

"If a bull break into an enclosure of a neighbor, and there gore a horse so that he die, his owner is liable in an action of trespass *quare clausum fregit*, in which the value of the horse would be the just measure of damages." *Dolph* v. *Ferris*, 7 Watts & Searg. R., 367.

"If the owner of a horse suffers it to go at large in the streets of a populous city, he is answerable in an action on the case, for a personal injury done by it to an individual, without proof that he knew that the horse was vicious. The owner had no right to turn the horse loose in the streets." *Goodman* v. *Gay*, 3 Harris R., 188. In this case the writ contained the allegation of knowledge on the part of the defendant; but the court held that it was not material, and need not be proved.

The case before us is clearly within this class of cases last described. It is alleged in the writ that "the plaintiff had a valuable horse which was peaceably and of right depasturing in his own close, and the defendant was possessed of another horse, vicious and unruly, which was running at large where of right he ought not to be; and being so unlawfully at

large, broke into the plaintiff's close, and injured the plaintiff's horse, &c." It is also alleged that "the vicious habits of the horse were well known to the defendant;" but this allegation was not necessary, and may well be treated as surplusage. If the defendant had had a right to turn his horse upon the plaintiff's close, it would have been otherwise. But if the horse was wrongfully there, the defendant was liable for any injury done by him, though he had no knowledge that the horse was vicious. The gravamen of the charge was, that the horse was wrongfully upon the plaintiff's close; and this was what was put in issue by the plea of not guilty.

Nor are these principles in conflict with the decision in the case of *Van Lenven* v. *Lyke*, 1 Comstock, 515. In that case the action was not sustained, because the declaration was not for trespass *quare clausum*, with the other injuries alleged by way of aggravation. But in that case there was no allegation that the animal was wrongfully upon the plaintiff's close; or that the injury was committed upon the plaintiff's close. 4 Denio R., 127. And in the Court of Appeals it was expressly held, that "if the plaintiff had stated in his declaration that the swine broke and entered his close, and there committed the injury complained of, and sustained his declaration by evidence, he would have been entitled to recover all the damages thus sustained." 1 Coms., 515, 518.

In the case before us, though the declaration is not technically for trespass *quare clausum*, it is distinctly alleged that the defendant's horse, "being so unlawfully at large, broke and entered the plaintiff's close, and injured the plaintiff's horse," which was there peaceably and of right depasturing. This was sufficient; and the instruction given to the jury, "that if the defendant's horse, at the time of the injury, had escaped into the close, and was wrongfully there, and while there occasioned the injury, then the plaintiff would be entitled to recover," was correct. And this being so, the instruction requested, "that the plaintiff must prove,

in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the injury," was properly refused.

Exceptions overruled.

CUTTING, J., did not concur.

COUNTY OF CUMBERLAND.

JACOB T. LEWIS *versus* CHARLES E. SAWYER.

Where one has in his hands the money of another, which he ought to pay, he is liable in an action for money had and received, although he has never seen or heard of the party who has the right of action, and when the fact is proved that he has the money, if he cannot show that he has a legal or equitable ground for retaining it, the law creates the privity and the promise; but where a debtor has placed money in the hands of another as his servant, to deliver it to his creditor in payment or part payment of his debt, he may recall it, and the servant will not be liable to the creditor therefor.

If a debtor places money which he owed his creditor, in the hands of his servant, for the purpose of discharging the debt, and the servant retains it, an action for the money may be maintained by the creditor against the servant; but if the debtor, before payment of the money by the servant, takes back the money, the servant is not liable to the creditor; and any person to whom money is paid for such purpose, is thereby the servant of the debtor; but otherwise if the money is paid to or sent by an agent of the creditor, as thereby the debtor would be discharged.

EXCEPTIONS at *Nisi Prius*, GOODENOW, J., presiding.

This was an ACTION of ASSUMPSIT upon a promissory note, payable to Levi Sawyer & Son, and by them indorsed.

Levi Sawyer, one of the defendants, deceased after the action was brought, which was thenceforward prosecuted against the other defendant, as surviving partner.

The general issue was pleaded.

The plaintiff offered the note described in the writ. The defendant objected to the reading, on the ground, that though he put the name of L. Sawyer & Son on the back of the note, the act was not within the scope of the partnership business, and because the *waiver* of demand and notice was not on the note when he indorsed it. The court over-

ruled the objection, and the note was read to the jury, without proof of the execution of the indorsement.

The judge instructed the jury, among other things, that if they found the note was fraudulently altered by Porter, and put into circulation, and he had a consciousness he had fraudulently altered it, and sent money to Sawyer for the benefit of the holder, and it was received by him, then Sawyer would be holden in this action, on the money counts, although he would not be on the note.

That if they found the waiver was placed on the note without the consent of Sawyer, and that the draft on Parker was placed in his hands by Porter, appropriated to payment of this specific note, it was not competent for the defendant and Porter, at any time afterwards, to agree that the amount of the drafts should be otherwise appropriated.

That if the note was altered without the consent of Sawyer, and Porter had put the draft on Parker into the hands of Sawyer, for the purpose of paying this note, then the right of the plaintiff would become vested in the property, and the defendant could not have appropriated it for other purposes, even with the consent of Porter.

The counsel for the defendant requested the court to instruct the jury, that if Porter, at first supposing Sawyer was liable on the note, gave him the draft on Parker, the amount of which was to be appropriated to payment of this note, it was competent for him and Sawyer to make a different appropriation of the draft before the note matured, but the court declined to give the instruction.

The jury, under the instructions of the court, returned a verdict for the plaintiff, with a special finding, that the waiver of demand and notice was put upon the note without the knowledge or consent of the defendant.

Shepley & Dana, counsel for the defendant.

I. The first instruction was erroneous.

If the defendant was not liable on the note, he would not be on the money counts. The claim under the money counts

is restricted and limited to proof of the execution, &c., of this very note. The right of recovery is restricted to proof of the claim stated in the specifications. *Goding* v. *Morgan*, 37 Maine R., 419; *Smith* v. *Kirby*, 10 Met. R., 150.

There is a count for money had and received, without any specification; but this will not enable the plaintiff to recover of the defendant the amount of the draft, for this was originally a suit against Levi Sawyer & Son. The declaration is that *they* indorsed the note of Porter. Upon this suit their partnership property was attached, and on the death of the senior partner the suit was prosecuted against the defendant, as survivor. To obtain a judgment in such a suit the cause of action must be joint—against both partners; and on execution issued on such a judgment the property of the *firm* attached on the original suit might be sold, though nominally, the survivor was the sole execution debtor.

A cause of action against one alone cannot be joined in a suit against two. To maintain this action the plaintiff must prove the same as he would if Levi Sawyer had not deceased. In such a suit the count for "money had and received by said *defendants*," is not supported by proof of a sum of money received by *one* of the defendants on a draft payable to his sole order, and not put into the funds of the partnership. The *allegata and probata* must conform to each other.

II. The instructions in regard to the appropriation were erroneous.

The case shows that though at one time Porter intended the proceeds of the draft should be applied to the payment of this note, that he subsequently changed this appropriation, and directed the defendant to appropriate it to the payment of other claims. This it was competent for him and the deendants to agree to do.

There is nothing to show that the plaintiff ever had any knowledge of this first intention of Porter to have the proceeds of the draft applied to the payment of this note. He does not even pretend that he ever assented to such an arrangement.

The second instruction of the presiding judge is erroneous, at any rate, in this, in not stating, both that *some* knowledge or assent of the plaintiff to the appropriation would be necessary, and that the money should have been received by Sawyer, in order to deprive Porter and Sawyer of the power to change subsequently the appropriation.

In saying that the plaintiff had a vested right in the proceeds of that draft, merely from one act of volition on the part of Porter & Sawyer, without any consideration passing from the plaintiff, or any knowledge or assent on his part, is saying too much.

Indeed, *what* right vested in the plaintiff by the some time intention of the other parties that he should receive the proceeds of that draft?

No consideration moved from him. He never ratified the act, nor had any knowledge of it till the intent was changed.

A vested right in money is the property in the money, and the plaintiff, under the instruction, could have maintained trover for it, even though he had no knowledge of its existence.

It would have been competent for him to allow the defendant to collect the draft for him, and to release the defendant from any supposed liability as indorser of the note, upon Sawyer's agreement to collect the money and pay it over. That arrangement would have given the plaintiff an interest in the draft and its proceeds, but he never assented to any such thing, and he sets up no claim in his writ to any such proceeds. There is no pretense that he looked or agreed to look to the proceeds of this draft as his property, or any additional security for the payment of the note. The whole transaction in regard to the draft was one entirely between the defendant and Porter. How long must a mere intention to appropriate a sum of money to a particular object continue, without the knowledge of the party to be benefited, before it can be changed? According to the instructions an intention cannot be instantaneously changed.

By the verdict, it seems the defendant owed nothing to

the plaintiff at the time this draft was put into his hands. Porter placed a certain fund in his hands for the benefit of the plaintiff. This the defendant received for that purpose. Then Porter decides to withdraw that sum from the purpose once intended. What right has Sawyer to *refuse* his assent?

If Porter, owing nothing to Sawyer, had placed this money in Sawyer's hands temporarily, with direction to pay it to a third person, and subsequently Porter had concluded to withdraw that sum from the defendant's hands, the defendant would not have been justified in withholding it. The plaintiff had received no knowledge of it; he had no claim on the defendant, who was, therefore, justified and legally obliged to obey Porter's instructions in the disposition of the money.

The fact, then, that Sawyer was a creditor of Porter, does not alter Porter's right to change the direction in which the money should go.

J. Rand and *Deans*, counsel for the plaintiff.

TENNEY, C. J. The writ was originally against the defendant and Levi Sawyer, as copartners, under the firm name of Levi Sawyer & Son. Levi Sawyer died, and the writ was amended, and the action prosecuted against Charles E. Sawyer, as surviving partner of the firm aforesaid. One count is upon a promissory note, dated December 6, 1854, payable in ninety days, to the order of Levi Sawyer & Son, for the sum of $2100, signed by S. W. Porter, and indorsed by Levi Sawyer & Son. Another count is for money had and received; and the third is a general money count, and under the last, it is stated, that the plaintiff will introduce the note described in the first count.

At the trial no evidence was offered, that notice was given to the indorsers of the non-payment of the note, upon a demand upon the maker at the maturity, and a refusal. But the plaintiff relied upon a written waiver of demand and notice by the indorsers upon the note; and the jury found that the words indicating the waiver were placed upon the note

without the knowledge and consent of the defendant, who was proved to have indorsed the note, in the name of the firm.

Without objection a draft of S. W. Porter, dated March 1, 1855, payable to the order of Charles E. Sawyer, in four months from date, at either of the banks in Boston, for the sum of $2100, was introduced, accompanied with the evidence that the same was delivered to the defendant for the purpose of meeting the note now in suit; and that after the money was received by him, which was about March 28, 1855, and before it is shown that the plaintiff had any knowledge of this draft, or the purpose for which it was in the hands of the defendant, Porter assented that the money received thereon should be applied to take up two other drafts of Porter, on which Levi Sawyer & Son were indorsers, amounting together to the sum of $1230,49, and the same was applied accordingly.

The note in suit not having been paid by the defendant in fulfillment of the original purpose of Porter, when he received the draft and the money thereon, this action is attempted to be maintained upon the second count in the writ. If no assent had been given by Porter to the diversion of the money, after it was received by the defendant, and he held the money as the surviving partner of Levi Sawyer & Son, an action like the present, brought after the money was so in his hands, might be maintained. The case would fall within the authorities relied upon by the plaintiff. "Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to the action of money had and received, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has a legal or equitable ground for retaining it, the law creates the privity and the promise." *Hall* v. *Marston*, 17 Mass. R., 575.

But the defendant insists, that the distinction between this case and the cases cited in its support, arising from the new direction given to the fund by the one who furnished it, ren-

ders the authorities relied upon entirely inapplicable; and that the instructions of the judge to the jury, that the receipt of the money by the defendant, for the purpose of meeting the note, created a vested right in the plaintiff, were erroneous.

We may infer from the facts of the whole case, that the maker of the note supposed at the time he delivered the draft to the defendant, that the latter was absolutely liable under the waiver upon the note, or that he would become so after its maturity, by a seasonable notice of its non-payment upon a demand upon the maker, and that he provided the draft as security for the indorsers, as well as to discharge his own debt. But under the second count, the defendant was not attempted to be charged as a party to the note, but on account of liability, arising from the receipt of the money, as a stranger to the note, which money he was equitably bound to pay.

The receipt of the draft and the money thereon by the defendant, cannot be treated as the acts of the plaintiff's agent, when the plaintiff was entirely ignorant of the facts. The defendant must be considered the servant of the maker of the note, in those acts, in the view which is presented under the exceptions. The doctrine of the instructions to the jury, touching the liability of the defendant under the second count, is, that where a debtor has placed money in the hands of another, as his servant, to deliver to his creditor in payment or part payment of his debt, it is not in the power of the debtor to recall it, so that the servant is not liable to the creditor therefor, even if the creditor, at the time of the recall, is ignorant of the transaction.

Has not the debtor, if satisfied of the unfaithfulness of his servant, after the delivery of the money to him, to be paid to his creditor, and the danger of allowing him to retain it, or for any other reason, the power to withdraw it; and when the servant surrenders it, is he equitably bound to pay the same amount to the creditor? The privity and the promise, which the law creates, is upon the ground that he actually

has the money; that the purpose for which it was delivered to him, that raises by the implication the promise that he will dispose of it according to that purpose, remains unchanged; and that he cannot show any legal or equitable ground for retaining it. Our attention has been called to no case affirming such a principle as that insisted on for the plaintiff, and we have been able to find none in our own researches. If such liability is created by operation of law, it must essentially change a common practice, with prudent men. For after one had received from a debtor a sum of money to be carried to a distant place, to be paid to his creditor, and failing to go as proposed, he could not return the money to the debtor, without being liable, in case the debt should not be paid.

The case of *Denny* v. *Lincoln, Admin'r*, 5 Mass. R., 385, is in its facts substantially similar to the one before us upon this point. Patterson, a debtor, in execution in the hands of the plaintiff, a deputy sheriff, delivered to Darling, the defendant's intestate, a sum of money equal to the amount of the execution, to indemnify him, on acconnt of his contract with the plaintiff, that Patterson should be produced at a future day, to be taken on the execution, or in default thereof, would pay the debt, if Patterson avoided, and by his consent the money was applied to other executions by Darling, in his hands, who was also a deputy sheriff. In an action for money had and received, against the defendant, as the administrator of Darling, for the amount left by Patterson, it was contended that the money so deposited by the debtor with Darling, was a voluntary payment to the plaintiff as the creditor, which could not be revoked; neither could Darling withhold it. PARSONS, C. J., in delivering the opinion of the court, says, "This position cannot be admitted, in all its extent. If a debtor should send by his own servant money which he owed to his creditor, and the servant refused to deliver it, and retained it, an action for the money might be maintained by the creditor against the servant. But if the debtor had, before payment by the servant, countermanded

his orders, and received back the money from the servant, he would not be liable to an action by the creditor; and any person by whom the money was sent, would for this purpose be the servant of the debtor. It would be otherwise, if the money had been sent, not by the servant of the debtor, but by an agent of the creditor; for there the debtor would have no further control over it, and the receipt of the money by the agent of the creditor would discharge the debtor."

How far the receipt of money by the defendant as indorser on the note, or the receipt of the draft before the maturity of the note, would render him liable without demand and notice; or how far he would be liable for any balance which may have remained in his hands, after the payment of the two drafts, which were taken up, by Porter's consent, in a suit not prematurely commenced, are questions not raised by the exceptions, and no opinion is expressed.

We think the instructions touching the liability of the defendant in the equitable action of money had and received, as applied to the facts of the case, were erroneous, in their full extent, even if this action had been instituted after the receipt of the money by him, upon the draft of $2100, as the surviving partner of the firm.

But in looking at the writ, we find that it is dated March 10, 1855. This is several days prior to the receipt of the money by the defendant upon the draft of $2100, which was not payable till four months after its date. There being no money in the hands of the defendant, at the time this action was commenced, it cannot be maintained upon the second count therein.

Exceptions sustained,
verdict set aside, and new trial granted.

CUTTING, J., concurred in the result, observing that—

This case discloses in substance, the following facts: On December, 6, 1854, one S. W. Porter made his note of that date for $2100, payable to the order of Levi Sawyer & Son, in ninety days after date, which was indorsed by the latter to

the plaintiff, and is the note on which the defendant, as surviving partner of the late firm of Levi Sawyer & Son, is indorser.

Tristram G. Mitchell testified that on March 1st, 1855, (which would be some eight days before the maturity of the note,) Porter drew on one Edwin Parker in favor of the defendant for $2100, payable in four months, and that the draft was drawn and delivered to Sawyer, (the defendant,) for the purpose of meeting this $2100 note.

The defendant, (Charles E. Sawyer,) testifies that after he received the money on the draft of $2100, Porter assented to his appropriating the money received on it to the payment of two notes, (one dated July 18, 1854, for $680.49, payable in six months, and the other dated October 6, 1854, for $550 in four months, both signed by Porter, and indorsed by Levi Sawyer & Son, by whom they were paid; that he received the money on the draft, March 28, 1855, or about that time.

Now under this evidence, about which there seems to have been no controversy, the real question was, whether the defendant was legally liable as an indorser, assuming as the jury found that the words "waiving demand and notice" were placed over the signature of the defendant, without authority. And that question was or should have been this: Was it necessary, under the circumstances, in order to charge the defendant as an indorser, that he should have had due notice of a demand, and a refusal of payment? The correct solution of this question depends upon the situation of the parties at the time of the maturity of the note, to wit, on March 8, 1855, at which time the defendant held Porter's draft on Parker for the amount of the note for the express purpose of securing him against his liability as indorser, which draft was subsequently paid, and the inference consequently is, that it was responsible paper. In Edwards on Bills and Promissory Notes, 637, it is said that "the object of notice is to put the indorser on his guard and enable him to secure his indemnity from the maker or prior indorser; and where that has been fully accomplished, so that the

indorser has obtained every thing which notice was intended to enable him to obtain, he is liable without notice." And further, "If the indorser has taken full and ample security against the liability incurred by him, he is not entitled to notice." Citing *Cramer* v. *Sanford*, 4 Watts & Serg. R., 328; *Lewis* v. *Kramer*, 3 Md. R., 265; *Corney* v. *Decosta*, 1 Esp. R., 302. But this principle is too well settled to require the citation of authorities; it has become an axiom of the commercial law. Upon the defendant's own testimony, then, recognizing as he does that of Mitchell as to the reception of the draft, and its appropriation, the plaintiff was entitled to recover on his first count. But such an issue was not presented to the jury; the first count appears to have been abandoned on certain contingencies, and reliance placed onthe money counts. I concur in the opinion, that the plaintiff cannot succeed upon those counts, and that the ruling in that particular was erroneous.

SALLY P. MURRAY, *Complainant, versus* LAURENS J. JOYCE.

It was the purpose of the statute of 1856 in relation to witnesses, to enlarge the sources of evidence in all those cases to which it was intended to apply, by removing the legal restrictions *then existing* upon the rights of parties to give testimony in their own suits; and it applies to suits where but one party can be a witness.

The preliminary conditions required of the complainant by the statute relating to the maintenance of bastard children, are not removed by the statute of 1856, and the respondent is made a competent witness thereby; the second section of that statute being limited in its application to such parties as were made witnesses by the first.

This was a COMPLAINT under the Bastardy Act, and comes before the court on EXCEPTIONS to the ruling of GOODENOW, J.

The examination of the complainant was held and taken

before the Municipal Court at Brunswick, on the 8th day of September, 1854.

The declaration was duly filed.

The complainant was introduced, and testified, among other things, that she was on the ninth day of April, 1853, confined of a male bastard child; that said child was begotten by Laurens J. Joyce, in the month of July or August, 1852.

The defendant was offered to testify, and was objected to by the complainant's counsel, but the objection was overruled, and he was allowed to testify.

Among other things, said defendant testified that he never had illicit connection with the complainant, at any time nor at any place; that he heard the statements made by her on her examination here; that his denial covered all her charges of improper intercourse between them; that he was not the father of her bastard child; that he knew he was not; that he never attempted to have any connection with her at any time or place.

The verdict was for the defendant.

To the rulings of the court admitting the defendant as a witness, the complainant excepted.

Shepley & Dana, counsel for the complainant.

The proceedings under the Bastardy Act remain unaffected by the act of 1856, in relation to witnesses, and this act cannot be made to apply to proceedings under the Bastardy Act.

The position of the respondent, as an incompetent witness, must therefore remain the same.

Under the Bastardy Act, which still remains upon our statute books unaltered, it is necessary that the complainant should make her accusation upon oath before delivery, repeat the same during the time of her travail, and continue constant in her accusation of the same person as the father of her child; under these restrictions, and only then, she is

entitled to become a witness in the trial of the cause; but if we regard the act of 1856 as applying to proceedings under this act, this could not be. The complainant would be inadmissible as a witness, until after the defendant had offered himself as such. Here, then, she is at once allowed the privilege and refused it. This is plainly a *reductio ad absurdum;* its fallacy is clear upon the very face; for if this position were correct, no complaint could be entered and no action could possibly be brought under the Bastardy Act; it would indeed be virtually repealed, and an injured woman could then have no remedy for her wrong, and the town no protection against its liability to support bastard paupers.

But then if the act of 1856 is not designed to apply to the complainant in these proceedings, as it clearly is not, how then can it be held applicable to the respondent, and to give him alone the benefit of its provisions?

This position, we think, will be found wholly untenable. In ordinary cases, if the defendant chooses to offer himself as a witness, then the plaintiff is also entitled to an examination; but in this case the circumstances are from their very nature essentially different. The complainant is the only *real witness,* and must necessarily first come in, in order to make out a case. Here then the reason for the new law ceases, and the well known maxim, *ratione cessante cessat lex,* applies.

The act too must be taken as one and entire, complete in itself, and it is evident that if held applicable to the respondent, it must clearly be so in regard to the complainant; but this we have shown to be absurd; it is not applicable to her, and cannot then be forced to apply to the respondent; the application must be the same in regard to both; it is unique, entire, and cannot be separated.

It is clear, then, that the Bastardy Act is not, (as it was not intended to be,) affected by the act of 1856; and that proceedings under it are to be conducted as they always have been, and controlled by the same rules; if it were oth-

erwise, the legislature would have expressed it by an additional section; but as it is, they have left it designedly untouched.

Nor should the exclusion of the respondent be considered as a hardship upon him. There is no reason why he should be entitled to any more or greater privileges than he had before the passage of the new act.

It must be remembered that the oath taken by the complainant is taken under a more than usually solemn sanction; it is taken not merely under the pains and penalties of perjury, but in view of impending, perhaps immediate, death, almost before the awful presence of her God, during the pains and dangers of childbirth. Few, if any, women will be found so hardened, so depraved, as to perjure themselves in such an awful moment. With the respondent, however, the case is far different; if admitted, it is merely under the ordinary sanction of an oath. He is before the court charged with the crime of adultery. Is it unnatural to believe that he would rather be guilty of perjury, and have the knowledge of that guilt confined within his own breast, than to be adjudged in open court the father of a bastard child, and become at once the object of aversion and public scorn?

The disgrace attached to either position is far from enviable, and not a few would be found who would prefer to be guilty of perjury, satisfied that he would escape any public prosecution or conviction of his guilt, than to suffer the dishonor of being adjudged an adulterer, and becoming an object of public shame. Here then the barrier interposed for the protection of injured parties is entirely broken down, the sanction of the oath virtually dissolved, and the complainant is deprived of her just remedy. The hardship of such an application of the new act ought to be sufficient to satisfy us that it cannot be held to apply to proceedings under this process.

The object of it was to promote the ends of justice, and a forced application of it cannot be made to cases like the present, where its effect is obviously to defeat this very end.

W. G. Barrows, counsel for the defendant.

1. A bastardy process is "a civil suit or proceeding at law," having all the essential incidents of other civil proceedings. The defendant's bond runs to the complainant, and she can settle the claim as she pleases, unless the selectmen of the town interfere, by virtue of the statute provision. The pleadings are in writing—the verdict of the jury is in writing. The jury are not specially empanneled to try the case, and the personal presence of the defendant at the time of the trial is not necessary. Depositions are held admissible without any specific statute provision, and costs are allowed to the prevailing party. *Eaton* v. *Elliot*, 28 Maine R., 438, 439, and cases there cited.

2. By statutes of 1856, ch. 266, s. 1, it is enacted that no person shall be *excused* or excluded from being a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the suit as party or otherwise, except as thereinafter provided.

3. Section 2d of the same chapter nowhere prohibits the defendant from offering himself as a witness, in a case where the cause of action implies an offence against the criminal law, on the part of the defendant, but on the contrary expressly recognizes his right so to do. And the true intent of that section is to prevent his being required by the opposite party, under section 1, to criminate himself, and the right construction of the 2d section does not exclude the testimony of those who are made witnesses by virtue of some other statute or any well settled principle of the common law, the design of the statute being to enlarge and not to restrict the sources of evidence.

By way of illustration, in case of the theft of a casket, the contents of which are known only to the owner, and the theft being proved by other witnesses, would not the owner now be admissible to prove the contents of the casket *ex necessitate*, as in the case of *Herman* v. *Drinkwater*, 1 Maine R., 29? The error is in supposing that the parties to suits are admissible now *only* by virtue of this statute. We contend

that the rights of those parties who were previously admissible remain unaltered, and the door is opened wider for the admission of others. *Jackson* v. *Collins*, 3 Corwin R., 89; *Wilkinson* v. *Leland*, 2 Peters R., 662; *Holbrook* v. *Holbrook*, 1 Pick. R., 248; *Henry* v. *Tilson*, 17 Verm. R., 479; *Crocker* v. *Crane*, 21 Wend. R., 211; *Morris* v. *Delaware and Schuylkill Canal*, 4 Watts & Seargent R., 461.

4. A case of this description is the very one, of all the different classes of cases, to test the wisdom of the principle upon which the statute is founded. The facts are peculiarly within the knowledge of the parties. The necessity for such a statute is not apparent in suits where all the transactions pass under the eye of persons not immediately interested. The theory of the statute is, that truth can be best extracted from the testimony of those who must necessarily know all there is to be known about the case. Where can a better opportunity be found to test its correctness than in a case like this? *Winslow* v. *Kimball*, 25 Maine R., 495; *Allen* v. *Parish*, 3 Ham, 198, given in the U. S. Digest, vol. 3, p. 484, s. 64; *Sch. Harriet*, 1 Story, 257; *Beals* v. *Hale*, 4 Howard R., 37; *Brown* v. *Wright*, 1 Greenl. R., 240; *Scott* v. *Searles*, 1 Smedes & Marshall R., 590.

5. In subsequent sections of the statute, ss. 3 and 6, the legislature have carefully specified certain cases to which they did *not* intend the statute should apply, and the inference is strong, taken in connection with the comprehensive language used in s. 1, that they contemplated its application in all cases not expressly excluded.

MAY, J. In civil suits by the common law, not only the parties, but all others having a certain and direct interest in the event of the suit, however small, were excluded from testifying. This rigid rule of the common law has been, from time to time, very much relaxed by legislation in this and some other states. So also in England. In this state it has been entirely repealed. Whether such legislation, to the extent to which it has been carried, is wise or unwise, is not

a question which we are called upon to determine. At the trial of this case, the respondent was admitted as a witness, against the objection of the complainant, and the question now presented is, whether such admission was authorized by law; and the answer depends wholly upon the construction of our statutes.

By the statute of 1855, ch. 181, all legal objection to the competency of witnesses, arising from interest in the event of the action, was removed in most cases; and it was further provided by the statute of 1856, ch. 266, s. 1, that "no person shall be excused or excluded from being a witness in *any* civil suit, or proceeding at law or in equity, by reason of his interest in the event of the same, as party, or otherwise," except as is thereinafter provided. Does this provision, by a true construction, allow the respondent to a process under the Bastardy Act, R. S., ch. 131, to be a witness? Does the language used fairly embrace such a case?

To say nothing of the other phraseology used in the first section of the statute of 1856, the words, "any civil suit," must be regarded as embracing such proceedings. In the case of *Wilbur* v. *Crane*, 13 Pick. R., 284, where it was contended, under a statute similar to ours, that the proceedings were in some respects in the form of a criminal prosecution, the court say, "we consider the form of the process immaterial; the suit is in substance and effect a civil suit, as much so as it would have been, if the remedy provided had been a special action on the case." In this state also such proceedings have, by judicial construction, been held to fall within the provisions of statutes relating to civil suits. They have all the essential characteristics of such suits. *Eaton* v. *Elliot*, 28 Maine R., 436; *Mahoney* v. *Crowley*, 36 Maine R., 486; *Smith* v. *Lint*, 37 Maine R., 546.

In view of these decisions, it is to be presumed that the legislature intended to include in the language used by them, all such cases as had before been determined by this court to fall within the meaning of the terms they employed.

It was obviously the purpose of this statute to enlarge

and not to restrict the sources of evidence in all those cases to which it was intended to apply, by removing the legal restrictions *then existing* upon the rights of parties to give testimony in their own suits. There was no necessity for such a statute in cases where such right existed before. It applies to suits in which but one party, from the very nature of the case, can be a witness, as where one party is a corporation and the other not. It applies also to cases in which, by the statutes then in force, or by the common law, one party had the right to give testimony, and the other not. This statute was not intended, in any way, to affect such existing rights, but only to confer the right where it did not previously exist. By it, the statutes conferring such rights were not repealed; nor do we think that the preliminary conditions required of the complainant by the statute relating to the maintenance of bastard children, before cited, are removed. If such had been the intention of the legislature in regard to a provision in the statute, so important in its nature to the rights of the respondent, we cannot doubt but that there would have been some direct reference to the fact, or some language used in the repealing statute unequivocally expressive of such intention. While, therefore, the rights of the complainant remain as they were before the passage of this statute, we are fully satisfied that by virtue of the language used in the first section, the respondent is made a competent witness, unless excluded by some of the subsequent provisions of the act. This is not pretended by the able counsel for the complainant.

It is, however, contended, that the provisions of the second section of this statute are of such a nature as to show clearly that the legislature could not have intended that the first section should be applied to either of the parties under the Bastardy Act, because it is said that if it applies to one party, it applies to both, and that such application effectually puts it in the power of the respondent to defeat the whole beneficial operation of that statute. If this were so, it would deserve grave consideration, whether the statute would not

bear some reasonable construction that would avoid such effect. Notwithstanding the able and ingenious argument of the counsel for the complainant, we are not satisfied that any such consequences will result. By the construction which we give to the act, they are avoided.

The second section provides, that "parties shall not be witnesses in suits where the cause of action implies an offence against the criminal law, on the part of the defendant, unless the defendant shall offer himself as a witness, in which case the plaintiff may also be a witness."

It is urged, that, by the very terms of this section, if the respondent is admissible as a witness, then the complainant is to be excluded, unless the respondent first offer himself, because the suit by implication charges him with a criminal offence; and it cannot be denied but that a literal construction of the language might have this effect. That the cause of action in proceedings under the Bastardy Act implies an offence against the criminal law, on the part of the defendant, is certain. It equally implies an offence on the part of the complainant. No such prosecution can be sustained without proof of the guilt of both. The language of the statute does not necessarily designate a case where both parties are *in pari delicto* as to the offence implied; and there would seem to be no reason in such a case, why the right of one party to elect to be a witness should attach any more to one party than to the other; nor why the right of either party should be made to depend upon the election of the other.

It is also true that the construction of this second section which is contended for, would be a virtual repeal of the Bastardy Act, by putting the maintenance of any prosecution under it wholly at the will of the respondent. Under that statute it has been fully settled, that no prosecution can be sustained unless the party seeking to avail herself of the remedy which it affords, proves all the facts necessary to bring her case within the statute, among which is the fact that the mother accused the putative father, during the pains

of parturition, with being the father of the child. If this is not done, the respondent must be acquitted, however strong may be the proof of his guilt. He is entitled to the testimony of the mother, who alone, in ordinary cases, can know with certainty the paternity of her child. Her testimony is, therefore, indispensable to the maintenance of the suit. *Loring* v. *O'Donnell*, 12 Maine R., 27; *Stiles* v. *Eastman*, 21 Pick. R., 132; *Blake* v. *Jenkins*, 34 Maine R., 237. But this consideration, instead of being a reason why the first section of the statute should not be applied to make the respondent a witness, affords a stronger reason why the second section should not be so construed as to prevent the complainant from being a witness, except at the will of the respondent, if any other reasonable construction can be found. We think such reasonable construction sufficiently appears, when we look at the primary purposes of the act. We are, therefore, brought to the conclusion, that inasmuch as the first section of the statute, notwithstanding its general language, was designed to act only upon parties, *who, at the time of its passage*, were incompetent to testify in their own suits, the second section can fairly be limited in its application, and ought to be limited, to such parties only as were made competent witnesses solely by virtue of the first section in the act. Taking the two sections together, the word "parties," in the second section, cannot properly be made to include any other. The reasons, therefore, which are urged for the exclusion of the respondent cannot prevail.

Exceptions overruled.

CUTTING, J., did not concur.

INHABITANTS OF YARMOUTH

versus

INHABITANTS OF NORTH YARMOUTH.

By the act of 1849, incorporating the town of Yarmouth from territory formerly a part of North Yarmouth, "together with all the persons having a legal settlement thereon," those persons whose legal settlement as paupers was at the time of the act, in that part constituting North Yarmouth, but who at that time were inmates of the poor-house upon that part constituting Yarmouth, and supported by the original town, where they had been for more than five consecutive years immediately preceding the act incorporating the new town, are not made chargeable as paupers to the town of Yarmouth.

The language of the act, "together with all persons having a legal settlement thereon," must be satisfied by referring to such persons as by the operation of other laws would have a right to a support from the town then incorporated, when it had previously an independent existence.

The facts in this case were agreed by the parties.

The ACTION is ASSUMPSIT to recover for the support of paupers.

It is agreed, for the purpose of presenting the question herein submitted, that before the incorporation of Yarmouth, the persons named in the declaration, viz.: William Crocker, Temperance Clough, Stephen Hall, and Frances Chase, were supported as paupers of said town, by the town of North Yarmouth, at the poor-house and town farm of said town, which are in the territory now constituting the town of Yarmouth, as described in the act incorporating the same, as follows:

"All that part of the town of North Yarmouth lying southerly of the following described line, namely, beginning, &c., *together with all the persons having a legal settlement thereon,* is hereby incorporated into a separate town, by the name of Yarmouth."

Before the 20th day of August, 1849, the day when said act took effect, and up to that day, William Crocker had

been an inmate of the poor-house, and constantly supported there as aforesaid, since October 14, 1841. Temperance Clough and Stephen Hall had been inmates, and constantly supported at the same place, in the same manner, and up to the same time, for a longer period. Frances Chase had been in like manner supported, at the same place, from July 13, 1837, until August 13, 1842, when she escaped from the place, and left the state. She returned to the town of Yarmouth, September 17, 1849, and went at once to the poor-house.

The plaintiffs' claim is for supplies to these paupers, January 24, 1851, and subsequently, to recover for which this action is brought, and of which due notice and reply are admitted. The plaintiffs offered to prove, that before the respective dates, at which the above named persons became inmates of the poor-house, as before stated, they severally had their legal settlement in the town of North Yarmouth, as then constituted, and resided within the territory which, after the division of said town, constituted the present town of North Yarmouth, and for the purpose of determining the question, whether the plaintiffs can maintain an action against the defendants, upon the facts herein stated, it is agreed that such settlement and residence can be proved.

Willis & Fessenden, counsel for the defendants.

The persons named all had a settlement in the *town* of North Yarmouth, and not in any particular part thereof, at the time of division. There is no such thing as a legal settlement in any *part* of a town. Consequently, upon the division, the liability to support them must fall upon the part where they *dwelt* at the time, unless otherwise fixed by the act of division. *Mount Desert* v. *Seaville*, 20 Maine R., 341; R. S., ch. 32, s. 1, 4th specification; Laws of Maine, ch. 122, s. 2, 6th mode.

This act makes no change. "Having a legal settlement thereon," is the language. The settlement in a town must be where they dwelt, as before the division, they had no

settlement *on* any part of North Yarmouth. Frances Chase comes under the first clause of the same specification. *Sutton* v. *Dana*, 4 Pick. R., 117.

Bradbury & Morrill, counsel for the plaintiffs.

Prior to their support at the poor-house, the several paupers had their legal settlement in North Yarmouth, gained by residence upon the territory within the present limits of the town.

Crocker, Clough, and Hall were transferred from their respective homes to the poor-house, which was on the territory now constituting the town of Yarmouth, and there supported as paupers, from October 14, 1841, to the commencement of the action.

1. Neither the act of the legislature incorporating Yarmouth, nor their transfer to the poor-house, changed their settlement from North Yarmouth.

In the act dividing that town, the legislature undertook to prescribe what class of paupers should fall upon the new, and what upon the old town, for support. The act assigns to the new town "those persons having a legal settlement upon the territory within its limits."

The language of the act is as follows: "All that part of North Yarmouth southerly of the following limits, &c., together with all persons having a legal settlement thereon, is hereby incorporated into a separate town, by the name of Yarmouth."

Who are the persons thus made to constitute the inhabitants of the new town? Who are embraced by the language, "having a legal settlement thereon?"

This language has already received a judicial construction, and the legislature must be presumed to have adopted it, having reference to that construction.

In *Belgrade* v. *Dearborn*, 21 Maine R., 334, this language is held to include those persons who had acquired, upon the territory specified, such settlement as would give a right to support.

It is held to designate the persons assigned to the new town, to wit: those who had acquired upon the territory thereof a legal settlement. By necessary implication all others are excluded. None others than those thus embraced are devolved upon it for support.

It follows, then, that those paupers who had acquired their settlement in North Yarmouth, by residence upon that part of it which was *not set off* and incorporated into Yarmouth, were not transferred by the act to the latter town, unless their support at the poor-house changed their settlement.

The case is not left to stand on the provisions of the *general law* applicable on the division of towns. It is taken out of their operation by the *special provision* in the act, which makes new and different arrangements in regard to paupers. Under this *new provision* the town of Yarmouth is made liable for the support of paupers residing in another town at the time of the passage of the act, if they had acquired a settlement in North Yarmouth by a residence of more than five years in the part incorporated into Yarmouth. Under the *general law* all this class of burdens would fall upon the old town of North Yarmouth. A large class of burdens is thus imposed by the act upon the new town, from which it would, under the general statute, be exempt.

It has imposed them, because, as has been justly held in *Belgrade* v. *Dearborn*, the language of the act must be regarded as specifying the burdens taken by such town; and by necessary implication excluding all others.

It will be seen by reference to the various acts for the division of towns, passed since the promulgation of the decision in *Belgrade* v. *Dearborn*, that the legislature has generally adopted and employed the language defined in that decision.

It has been adopted because it has been understood to have received a judicial interpretation, by our highest legal tribunal, prescribing and determining the burdens of the respective towns.

It was emphatically so in this case. A new decision, giv-

ing a different interpretation of this language, would work great injustice in all the various cases where the language used in this case has been employed.

And it would do more; it would impair the public confidence in the stability and consistency of the decisions of the court.

2. The transfer of these paupers to the poor-house, and their support there by the town, did not constitute such residence, as to change their settlement.

Their residence and domicile were upon other territory, where they had acquired a legal settlement. This could not be changed by the compulsory act of the town. A residence to give a settlement, must be a voluntary one. The insane at a hospital, prisoners confined in prison, and paupers at a poor-house, can acquire no settlement by dwelling involuntarily in those places.

In no just sense can these involuntary abodes be called their residence or domicile. Domicile depends on residence and *intention;* both are necessary to constitute it. *Wayne* v. *Green*, 21 Maine R., 357.

In *Mount Desert* v. *Seaville*, 20 Maine R., 341, the point decided is, that as the paupers in question did not dwell and have their home on the territory incorporated into the new town, their settlement remained in the old town, under the provisions of the general settlement act. The principle decided in that case does not apply to the case at bar. The former stood on the general law. In the latter the act of incorporation, by language employed for the express purpose, defines the liabilities of the parties, takes the case from the operation of the general act, and devolves upon the new town for support only those who had acquired a settlement and right of support by residence upon the territory thereof.

Such is the obvious intention indicated by the language used. Any other construction would fail to give effect to this language.

It could never have been the intention of the legislature to devolve all the paupers of both towns upon the new town

for support, because the poor-house in which they were confined chanced to be within its limits; and hence they employed language obviously intended to distribute these paupers between the towns, assigning to each such as had acquired their settlement within the limits thereof.

This construction sufficiently appears, and it is for the court to see that it shall not be frustrated.

As to Frances Chase, the remaining pauper, she did not dwell and have a home, nor was she staying within the limits of Yarmouth at its incorporation, and she falls upon the old town for support, even under the provisions of the general law.

Willis & Fessenden, in reply:

The case of *Belgrade* v. *Dearborn*, cited by the plaintiff's counsel, can have no further effect upon this case than as it defines what is meant by the words, "legal settlement," in statutes of this description, dividing towns. About this there is no dispute.

It is manifest, as we contend, that the phrase, "all persons having a legal settlement thereon," can have no application to persons residing on the original territory at the time of division. Such person, unless there is a special provision to the contrary, fall, necessarily, in the town embracing their place of residence at the time. The provision can apply only, and was meant only to apply, to persons having a legal settlement in the town divided, but residing elsewhere, and not having gained any other settlement, at the time of division.

Any other construction would lead to innumerable difficulties and absurdities. For instance, on the construction contended for by the plaintiff, a person residing on the territory constituted a new town, by the name of Yarmouth, at the time of division, having his domicile there, doing business and owning property there, not a pauper, or likely to become one, *but* who had acquired his original settlement in the town by a residence on the territory now North Yar-

mouth, and had not resided on the part now Yarmouth, for five years previous to the division, would, on the plaintiff's construction, belong to North Yarmouth *after* the division, and *vice versa.* A consequence clearly absurd and inadmissible.

The court, then, must perceive, that either this provision does not apply at all to persons residing on the original territory at the time of the division, *or* that as to persons so residing, "legal settlement" and "residence" at the time of division are synonymous; and this last is reasonable, because, by law, there is no such thing as a settlement in any *part* of a town. If a settlement exists, it is in the town as a *whole,* and on a *division* the legal settlement attaches to the residence at the time.

The act of division makes no distinction between paupers and other persons. The *language* is general, applying to "*all persons,*" and the court, it is apprehended, can make no distinction which the legislature has not chosen to make, nor can the court provide for a case which the legislature has not provided for.

The statute says nothing of domicile, nor does the question of domicile arise. But it is clear that neither of these paupers had any home or domicile, at the time of division, or for a long time previous thereto, on the territory now constituting North Yarmouth. If they, or all but Chase, had no domicile in Yarmouth, they had none elsewhere. All they had was at the poor-house, and the statute says nothing of any former domicile. Their settlement was gained in the original town, and not in any particular part of it; and it *was* in the part now Yarmouth, at the time of division, for there they dwelt, and had their only home.

The case of Chase differs from the others in this, that she was absent from the *territory* at the time of the division. Had she resided in what is now North Yarmouth at the time she left, the statute dividing the town would have fixed her upon North Yarmouth, as she had gained no new residence. But her "legal settlement" at the time she left was in the

original town, and her residence—home—and consequently her "legal settlement," *after* the division, in what is now Yarmouth. Her settlement was *acquired* in what is now North Yarmouth, but it was continued in what is now Yarmouth, and the division found it there.

TENNEY, C. J. By special laws of 1849, ch. 264, s. 1, the territory described therein, "together with all the persons having a legal settlement thereon, are hereby incorporated into a separate town, by the name of Yarmouth, and the inhabitants thereof are hereby invested with all the privileges and powers, and subjected to all the duties and liabilities incident to the inhabitants of other towns in this state."

The words, "together with all the persons having a legal settlement thereon," will not admit of the construction, that such, and such only, as had a legal settlement thereon, in the technical meaning of the term "legal settlement," under pauper laws, should be citizens of the town incorporated. This interpretation would allow to persons who had long resided and continued to reside elsewhere, and in some instances to those who had never resided in North Yarmouth, as existing before the division, the enjoyment of privileges, and subject them to the liabilities of resident citizens generally; and on the other hand, those who were at the time of the division, and before, inhabitants of the same territory could have no such privileges, and would be subject to no such liabilities as are incident to the inhabitants of other towns, if they had not a legal settlement in the town incorporated. This would contravene constitutional provisions, and legislative enactments touching the elective franchise, and the liability to taxation. It is also forbidden by the language in the act immediately succeeding, whereby the inhabitants are invested with privileges and made liable to duties incident to the inhabitants of other towns. Such construction, the counsel for the defendant properly contends, would be absurd to such a degree that no one would insist upon it.

If the act had not contained the words, referring to per-

sons having a legal settlement on the territory incorporated into the town of Yarmouth, the section would be intelligible and perfect. And as in other cases of the division of towns, the general statutes touching the support of paupers, would furnish the rules for the guidance of the two towns in this respect. But the words are important in their abstract signification, and were inserted in the act for some purpose, and effect must be given to them, if possible. The "persons" here referred to, were designed in some event, or under some circumstances, to hold a relation to the town incorporated.

In the annexation of a part of the town of Dearborn to the town of Belgrade, in 1839, by ch. 553, s. 1, of special laws, that part of Dearborn therein described, "with the inhabitants having a legal settlement thereon," is set off therefrom and annexed to the town of Belgrade. It will be perceived, that the language in that act, quoted above, is identical with that which we are now considering, excepting that in the former the word "inhabitants" is used for the word "persons" in the latter.

In the case of *Belgrade* v. *Dearborn*, 21 Maine R., 334, the court give construction to the language contained in the act annexing a part of the one town to the other, and says, "a settlement so gained is what is intended by a legal settlement, viz.: a settlement which gives a right to a support from the town, in case of falling into distress and becoming necessitous." And notwithstanding the court further say, that the language might be satisfied by restricting them to such persons as had a legal settlement in Dearborn, and were at the time of the annexation actually resident on the part annexed, it was held to include all who had acquired their settlement on the territory annexed, although removed therefrom at the time of the annexation. Under this authority, the language in the act incorporating the town of Yarmouth must certainly be as comprehensive, and will embrace those persons who had previously acquired a legal settlement on the territory composing that town.

It is insisted in defence, that a settlement in a town is in the town as a whole, and not upon a part of it, and that in a division the legal settlement attaches to a person according to his residence at the time of division. If such was the design of the authors of the act now under consideration, that design cannot be disregarded. It was, however, obviously intended not to provide that those having a residence on the territory of the new town, should by force of the act itself, have a legal settlement therein; but that all those who under the operation of other laws would have a right to a support from the town thus incorporated, in case of falling into distress, and becoming necessitous, provided that town had previously had an independent existence. It is not uncommon, in the division of towns, to provide that persons who should become chargeable to the town as paupers, should be considered as belonging to that town on the territory of which they had their settlement at the time of the division; and no practical difficulty has been found in giving effect to such provisions. As an example, may be mentioned the act of Massachusetts of 1814, incorporating the town of Bloomfield, which received a construction of this court in the case of *Bloomfield* v. *Skowhegan*, 16 Maine R., 58.

The parties agree that for the purpose of settling legal questions raised in the case, all the persons for whose support this action was commenced, had a legal settlement in the town of North Yarmouth as existing before the division, and had resided upon the territory which after the division constituted the present town of North Yarmouth, that all the paupers had been in the poor-house of the original town, situated on the territory of the town of Yarmouth for a much longer period than five years immediately before the act of division took effect, that three of them were actually inmates of the poor-house at that time; and that the fourth had escaped a few years before and left the state, but returned on September 27th, 1849, but was absent therefrom when the act went into operation.

The poor-house was for the accommodation of paupers of

the whole town, and they were supported at the common expense before the division. If it were designed that all the paupers resident at the poor-house when the act took effect, were to be supported exclusively by the town of Yarmouth afterwards, when the act provides for an equitable division of the joint property, including the farm on which the poor-house stood, and other joint burdens, unequivocal language in reference thereto would be expected. None, however, is found.

While the persons named in the writ were receiving aid as paupers, a residence in a town, a stranger to this controversy, for any length of time would not relieve the original town of North Yarmouth of any of its obligations. And by no principle known to the court, can a legal settlement be any better transferred by a change of residence from one part of the same town to another, when such a change would be entirely ineffectual if made into another town.

On the facts presented in the case, the plaintiffs are entitled to reimbursement of the sums expended in the necessary relief of the persons named in the writ; and according to the agreement of the parties, the action must stand for trial.

DAVIS, J., concurred in the result.

ALFRED WHITNEY *versus* THE ATLANTIC AND ST. LAWRENCE RAILROAD COMPANY.

By the eleventh section of their charter, the Atlantic and St. Lawrence Railroad Company are obliged to erect and maintain substantial, legal and sufficient fences on each side of the land taken by them for their railroad, where the same passes through enclosed and improved lands; and in default of which they are liable for injuries occasioned thereby.

By the lease and assignment of the Atlantic and St. Lawrence Railroad, that company have not relieved themselves from any liability for losses or injuries to which they were subjected by their charter and the laws of the state.

Whitney *v.* A. and St. Lawrence R. R. Co.

This is an ACTION ON THE CASE, to recover the value of a horse which the plaintiff alleges was killed by a locomotive of the defendants, in consequence of their neglect in keeping the fence in repair along the line of their road adjoining the plaintiff's improved land, where his horse was rightfully put by the plaintiff, and comes forward on EXCEPTIONS to the ruling of GOODENOW, J.

The location of the railroad in question, and the plaintiff's title to the premises described in his declaration, are not disputed. The plaintiff's farm where the railroad crosses it is improved land, and enclosed. The plaintiff's horse was killed at the time mentioned by an engine and train running upon the railroad in the ordinary and usual manner. The horse was lawfully in the plaintiff's field adjacent to the railroad, and escaped on to the railroad through the gate at the plaintiff's crossing, or through the fence. On each side of the railroad, as located, there were fences constructed by the defendants originally. At the plaintiff's crossing, near his buildings, were gates forming a part of the lines of the fences. These gates were made, and hung, and fitted by the defendants, when they constructed the fences for the convenience and accommodation of the crossing. There were no cattle guards to the crossing.

There was evidence tending to show that the fence by the plaintiff's field where his horse was kept, was defective by reason of a broken rail, adjoining the railroad, and that the defect had existed during three months prior to and at the time of the injury alleged, and that the fastening of the gate referred to was insufficient, and must have been so for a considerable time. There was also evidence of ordinary care on the part of the plaintiff.

It was admitted that the defendants leased their railroad in question to the Grand Trunk Railway Company, under the authority of the act of the legislature, of March 29, 1853, on August 5, 1853, and that the lessees immediately took possession and control, and management of the railroad and all the engines, cars, and equipments, depots and property

leased, and have ever since exclusively maintained and operated the railroad, with the engines, cars, and equipments by their officers, servants, agents, &c.

The defendants have kept up their organization, having a president and board of directors.

The defendants contend that while the railroad and property aforesaid, was under lease and in the possession and under the control and management of the Grand Trunk Railway Company as aforesaid, this action could not be maintained against them, the defendants, for killing the horse in the manner aforesaid.

But the presiding justice ruled otherwise, and instructed the jury that this action could be maintained against the defendants, notwithstanding the lease aforesaid, and although the lessees at the time of the killing were in possession of, and operating the railroad in the manner aforesaid.

The jury returned a verdict for the plaintiff.

Howard & Strout, counsel for the defendants.

The plaintiff must recover, if at all, for the nonfeasance of the defendants. He can only recover against the party guilty of negligence.

The case finds, that the Grand Trunk Railway Company were in possession of the defendants' railroad, and had exclusive management of the same. To the world they were the owners. For their negligence no one else was accountable.

The legislature, by act approved March 29, 1853, s. 1, authorized the defendants to lease their road in such a manner "as will enable the lessees thereof to maintain and operate" the same. August 5, 1853, a lease was made to trustees for the Grand Trunk Railway Company, of the entire property of said road, road bed, &c. This was made subject to the laws of this state. It was accepted upon the terms, that the lessees were to maintain and operate the same, in pursuance of all the general and special laws of the state. They

were to defend all suits. The trustees assigned the same lease to the Grand Trunk Railway Company, February 9, 1855, reciting that they had been in possession, operated, and maintained the road since the original lease.

Laws of 1842, ch. 9, s. 6, requires the railroad corporation to erect and maintain fences. It was the duty of the lessees to maintain the fences as provided by law. The law gave power to the defendants to lease as they have done. The neglect to repair fences, which lies at the foundation of the plaintiff's case, was the neglect of the Grand Trunk Railway Company, and not of the defendants.

The relation of master and servant did not exist.

The statute authorizing the lease, involved also, when the lease was executed, a transfer of the duties of the defendants to the Grand Trunk Railway Company, and the liability for the neglect followed the transfer of the obligation. If the obligations were transferred, then the lessors cannot be liable for the neglect of the lessees.

But in act of March 29, 1853, s. 1, it is also provided, that nothing in the act "shall exonerate said company" (the defendants) from any duties or liabilities now imposed upon them by the charter or the laws, and we submit that this language cannot make the defendants responsible for the nonfeasance or misfeasance of the parties who have the legal right to the possession and control of the railroad, and are bound by law to maintain fences.

This provision was evidently designed to afford protection for existing liabilities of the Atlantic and St. Lawrence Railroad Company. It could not be intended to make the defendants liable for nonfeasances and misfeasances of the lessees, over whom the defendants had no control.

No notice to the defendants of the defect in the fence was proved. Notice to the Grand Trunk Railway Company is not notice to the defendants.

For these reasons we deem the instructions of the judge erroneous.

Fessenden & Butler, counsel for the plaintiff.

The "proximate cause" of the injury to the plaintiff's property, in this case, and the gravamen of the action as declared in the writ, was the neglect of the defendants to maintain a sufficient and legal fence on the side of their road where the same passed through the enclosed and improved lands of the plaintiff. This obligation was laid upon them by their charter and by the statute laws of the state, and they are not to be released therefrom by a lease of their road to other parties. The act authorizing a lease of the defendants' road to the Grand Trunk Railway Company expressly provides that they shall not thereby be exonerated from any liabilities imposed on them by their charter or by the general laws of the state. Charter of Atlantic and St. Lawrence Railroad Company, special laws of 1845; special laws of 1853, ch. 150, s. 1; laws of 1842, ch. 9, s. 6; *Norris* v. *Androscoggin Railroad Company*, 39 Maine R., 273.

CUTTING, J. The eleventh section of the defendants' charter provides, that "said railroad corporation shall erect and maintain substantial, legal and sufficient fences on each side of the land taken by them for their railroad, where the same passes through enclosed and improved lands."

We refer to the decision of this court in *Norris* v. *Androscoggin Railroad Company*, 39 Maine R., 273, as decisive of the plaintiff's right to recover, unless the defendants' liability had been transferred to, and assumed by another corporation, before the cause of action had accrued. And in defence it is so contended, and to show that such was the fact, "the lease to trustees for the Grand Trunk Railway Company," of August 5th, 1853, and the "assignment to the Company" of February 9th, 1855, have been introduced. And, indeed, those instruments seem to have transferred, as contended, to the Grand Trunk Railway Company, upon certain terms, conditions, restrictions and limitations, the exclusive use and possession of the defendants' road and everything appertain-

ing thereto, for and during the term of nine hundred and ninety-nine years; and the case finds that at the time the plaintiff sustained his injury the road was so possessed and occupied.

But the defendants are a corporation subject to the laws of this state, and within the jurisdiction of her legal tribunals. Its responsibilities both as a corporation, and its stockholders, are well defined by the provisions of its charter, and the public laws of the state, by which provision is made for recovery of claims, and for redress of private wrongs; first by resort to, and a judgment and execution against the corporation, and subsequently, in a certain event, against the stockholders themselves.

Now, under such circumstances the defendants could not expect to relieve themselves of their numerous liabilities, as bailers or common carriers of merchandise, from the use of extraordinary care in the safety of passengers, and care and caution in preventing their engines from communicating fire to the forest, and to the habitations of residents along the line, and the destruction of life in various ways, by merely transferring such responsibilities to a foreign corporation, who are beyond the process of the courts of the state and of the union, unless *perchance*, it might be the possessor and owner of property within the jurisdiction.

The stockholders of the defendant company could never have conceived such an idea. If so, it was not for a moment entertained by the legislature, who, on application, permitted the transfer, but not without due regard to the responsibilities of the defendants and the rights and remedies of the citizen, for they declare that "nothing contained in this act or in any lease or contract that may be entered into under the authority of the same, shall exonerate the said company or the stockholders thereof, from any duties or liabilities imposed upon them by the charter of said company or by the general laws of the state.

According to the case of *Norris* v. *the Androscoggin Railroad Company*, before cited, the defendants had assumed the

duty of fencing the road, and were liable for the consequences of any future neglect. And they must have so understood it. They plainly refer to, anticipate and provide for such contingencies in their lease, under the *seventh* class of covenants and obligations.

Exceptions overruled,
and judgment on the verdict.

JOEL WATERHOUSE, *Petitioner, versus* COUNTY COMMISSIONERS OF CUMBERLAND COUNTY.

Petitioners for an increase of damages for the location of a highway, can make their application to the Court of County Commissioners at any adjournment of the second next regular session after the location of the same; and such petition must be regarded as legally pending for that purpose, until the close of such second session.

Where the time had not arrived for closing the proceedings and completing the records in cases pending before county commissioners when the county of Androscoggin was effectually established, which were embraced in its provisions, it was the duty of the court to transfer them to the new county.

PETITION FOR MANDAMUS to compel the Court of Commissioners for Cumberland county to complete their records, and came before the full court upon an agreed statement of facts. The history of the case appears in the opinion of the court.

J. C. Woodman, counsel for the petitioners, argued that the proceedings upon the petition were properly closed before the county of Androscoggin was established, and not rightly transferred thereto, and cited the following authorities: *Dow* v. *True et al.*, 19 Maine R., 46; *Metcalf* v. *Hilton*, 26 Maine R., 200; *Bowker* v. *Porter*, 39 Maine R., 505;

State v. *John S. Carter*, 39 Maine R., 262; *Bray* v. *Kelley et als.*, 38 Maine R., 595; *Patten* v. *Kelley*, 38 Maine R., 215; *State* v. *Leach*, 38 Maine R., 432; *Fisher* v. *McGim*, 1 Greenl. R., 1; *State* v. *Staples*, 37 Maine R., 228; *Gurney* v. *Tufts*, 37 Maine R., 130; *Harding* v. *Butler*, 21 Maine R., 191; *Williams* v. *Burrill*, 23 Maine R., 144; *Longfellow* v. *Scammon*, 21 Maine R., 109; *Fales* v. *Goodhue*, 26 Maine R., 423; *Wingate* v. *Leeman*, 27 Maine R., 174; *Butman* v. *Holbrook*, 27 Maine R., 419; *Call* v. *Barker*, 27 Maine R., 97; *Robinson* v. *Barker*, 28 Maine R., 310; *Gilligan* v. *Spiller*, 29 Maine R., 107; *Fessenden* v. *Chesley*, 29 Maine R., 368.

Anderson & Webb, counsel for the respondents.

The original petition was pending on the 15th day of April, 1854, before the county commissioners of Cumberland county, and was properly transferred to Androscoggin county, in compliance with the requirements of the statute approved on that day, being chapter 87, of 1854.

1. The commissioners were required by law to continue the original petition till their second next regular session, after they laid out the road and estimated damages, to give an opportunity to persons aggrieved to claim redress. R. S., ch. 25, ss. 5 and 6.

2. They could not legally finish proceedings and make a record, so long as any person had a right to present a petition for redress, and that right continued until the final adjournment of their "second next regular session," which was in June, 1854; for a petition presented *at any* period of the session, is presented at a regular session; and the session of a court includes all its adjournments, which are but part of its session. R. S., ch. 25, ss. 5 and 21; statute of 1854, ch. 60; *Harkness* v. *Waldo Commissioners*, 26 Maine R., 356; *Parsonsfield* v. *Lord et als.*, 23 Maine R., 515; 32 Maine R., 356; statute of 1852, ch. 221.

3. Inasmuch as the commissioners might have continued the original petition beyond two terms without material error, while if they had closed proceedings before the two ses-

sions had expired, their action would have been void, they were the judges whether they had finished proceedings or not. *Orono* v. *County Commissioners*, 30 Maine R., 202; 35 Maine R., 378; 32 Maine R., 454.

TENNEY, C. J. The petitioner, representing certain proceedings to have been had under the petition of Charles Millett and als., touching the location of a highway through certain towns situated in the county of Cumberland, but which now constitute a part of the county of Androscoggin, and on account of such location was awarded certain damages by a committee, which have not been paid; and that the respondents having neglected to close and complete the record of said proceedings till the act establishing the county of Androscogging went into operation; after which, still refusing to complete said proceedings by making a record thereof in their book of record, ordered the original petition aforesaid to be transferred to the county of Androscoggin. He therefore prays that a rule from this court may issue to the respondents, commanding them to appear and show cause, if any they have, why they have neglected to complete the record of the proceedings aforesaid, at the times specified in his prayer; and why a mandamus should not issue to them to close the proceedings on said petition, and cause a record thereof to be completed as of preceding terms of this court, as therein mentioned.

It is admitted on the part of the respondents, that the facts set forth in the application for a mandamus are true. But the power of this court to grant the writ is denied.

It is manifest, from the facts presented in the application for the writ, that the respondents were not guilty of an omission of any acts which they regarded it as their duty to perform; but that they, in the exercise of a judicial power, treated the proceedings as still pending before them, till their authority over the original petition was taken away by the act establishing the county of Androscoggin, statutes of 1854, chs. 60 and 87, and that thereupon they transferred

those proceedings to that county, as they supposed, according to the provision of s. 1 of the chapter last named, was their duty.

On the eleventh day of October, 1852, the county commissioners for the county of Cumberland determined that the public convenience and necessity required the location of the highway referred to, and they laid out the same according to the petition before them, and made return of their doings under their hands, to the next regular session of the Court of County Commissioners, holden on the third Tuesday of December, A. D. 1852, and they awarded certain sums to the present petitioners as damages to the land severally owned by them, over which the highway was so laid out.

From the adjudication upon the petition for said highway, an appeal was taken to the Supreme Judicial Court, next holden in the county of Cumberland, commencing on the third Tuesday of January, A. D. 1853. Upon certain proceedings in the Supreme Judicial Court at the term thereof holden on the third Tuesday of April, A. D. 1853, the judgment of the Court of County Commissioners aforesaid was affirmed as to a part of the highway laid out, and reversed as to the residue. Judgment was rendered thereon, and an order passed that the same should be forthwith certified to the Court of County Commissioners, at their regular session, which was holden on the first Tuesday of June, A. D. 1853. This judgment of the Supreme Judicial Court was entered by the Court of County Commissioners upon its docket, and the matter was there continued till its term holden on the third Tuesday of December, A. D. 1853, which term continued open by several adjournments till June 1, 1854.

On April 15, 1854, the statute establishing the county of Androscoggin, went into operation. Chs. 60 and 87, of that year. The process touching the highway, on account of which the damages in question originated, were made transferrable to the county of Androscoggin, if the same was legally pending on that day, in the county of Cumberland.

The appeal from the Court of County Commissioners, taken at its April term, A. D. 1852, caused the proceedings therein to be stayed; they so continued till its June term, A. D. 1852; that court was not open for the reception of petitions for an increase of damages, claimed to have been caused by the location of the highway, during this period, for it could not be known that any land would be finally appropriated to the purpose prayed for in the original petition. Statute of 1847, ch. 28, s. 2. The session of the Court of County Commissioners, holden on the third Tuesday of December, A. D. 1853, was therefore the second next regular session after the location of the highway, as finally established; and this, and the next preceding session were those at which the persons aggrieved at the estimation of damages, might present their petitions for redress. R. S., ch. 25, s. 5. Was it competent for persons so aggrieved to make their applications for redress at any of the adjournments of the second session of that court, after the establishment of the road? "The session of a court includes all its adjournments, which are but parts of its session." *Parsonsfield* v. *Lord*, 23 Maine R., 511. It would seem unreasonable to adopt the construction that the legislature intended to limit the applicants to the day on which the court began its session for each term, when the term might continue for several consecutive days, without the intervention of any day when it held no session. This would be inconsistent with the apparent liberality of the provision, in allowing petitioners to come in at two terms instead of one, especially when the court on the first day of each session might adjourn to a subsequent day thereof, immediately after the court was opened. The statute certainly does not require, in terms, that the petitions for such purpose shall be presented on the first day of each session. The case is quite unlike that, wherein the county commissioners are required to return their doings to the regular session held next after proceedings shall have been had and finished, in locating a road, as determined in the case just

cited. The reasons for the construction given to the statute referred to in that decision, are entirely inapplicable to the provision now under consideration.

It is the obvious meaning of the statute, that petitioners for an increase of damages can make their applications on the day next succeeding the one on which the session commenced; and if this could be done after the adjournment from the first to the second day, no reason is perceived for a denial of the right, at an adjournment for a longer period, or at any adjournment of the same session. The time, therefore, had not arrived for closing the proceedings, and completing the record, when the county of Androscoggin was effectually established.

Writ prayed for denied—petition dismissed.

COUNTY OF YORK.

SCHOOL DISTRICT No. 5, *in Sanford, versus* ENOCH F. LORD, *Appellant.*

The right of possession in the plaintiff at the time of the taking or detention, necessary to maintain replevin, may follow either the general or special ownership of the property.

As between a school district and a stranger, the possession of their records by the clerk, is the possession of the district; and replevin may be maintained therefor in the name of the corporation against one not legally elected as clerk.

By the act of 1850, ch. 193, an agent of a school district is not authorized to call a district meeting upon his own motion, without the written application of three or more legal voters of the district.

An application to the selectmen to call a meeting of a district for the choice of officers, bearing date before the town meeting was held at which it should be determined whether the district would be permitted to exercise that right, is premature, and all action under it void.

This is an action of REPLEVIN, to secure possession of a book of records containing the records of school district No. 5, in Sanford, in said county, and belonging to the inhabitants of said district, and alleged to have been illegally taken and detained by said defendant, and comes forward on an agreed statement of facts, having been originally commenced before a justice of the peace. The defendants pleaded the general issue, and a brief statement, alleging that on the date of the writ, March 31, 1855, he was and is the legal clerk of said school district, and that he was chosen clerk of said district on the 19th of said March, at the annual meeting of said district, and was duly sworn, and that the custody and keeping of said book of records, at the date of said writ, belonged to him.

School District No. 5 *v.* Lord.

The annual town meeting of Sanford was holden on the 12th of March, 1855, at which it was voted that the several school districts should choose their own agents, and on the 13th day of March, 1855, Porter Willard, the agent of said school district, chosen as hereinafter stated, issued his warrant calling a meeting of the legal voters of said school district, to be holden at the school house in said district, on the 20th of March, 1855, for the purposes, among other things, of choosing a clerk and agent of said school district for the ensuing year, without any application in writing to him from three or more legal voters of said district; that due notice was given of said meeting, and pursuant thereto the legal voters of said district met, and chose John Shaw clerk, and Porter Willard agent of said district, who were severally duly sworn.

Subsequent to 1849 the district meetings had been called by the agent of said district, by a notice signed by such agent, and posted up as the law requires, every year to the present time, for the purpose of choosing a clerk and agent of said district, without an application in writing of three or more legal voters in said district, and at these meetings a clerk and agent had been chosen and duly sworn.

And before the commencement of this suit said John Shaw demanded of the defendant, Enoch F. Lord, the book of records belonging to said district.

Upon the *application* in writing of six of the legal voters in said district, dated *March* 10, 1855, directed to the selectmen of said town of Sanford, upon which two of the selectmen, being a majority, in the afternoon of the 12th day of March, 1855, and after the town meeting on that day was dissolved, issued their warrant to Hiram Witham, one of the inhabitants who signed said application, requiring him to notify and warn the inhabitants of said district qualified to vote in district affairs, to assemble at the school house in said district, on the 19th day of March, 1855, to choose a clerk and agent for the ensuing year; that said application to said selectmen was presented to them on the said 12th of

March, after they had been chosen and sworn; that it appears by the records of said meeting that said Witham gave due notice of said meeting, and that pursuant to said notice, a meeting was holden at the time and place appointed, and six persons attended, being the same who signed said application, a majority of the voters in said district not having actual notice or knowledge of said meeting; that at this meeting Enoch F. Lord was chosen clerk, and George Chadbourne agent, who were duly sworn.

It is agreed to submit this case to the full court for decision, upon the facts agreed, as above stated, and if, in the opinion of the court said John Shaw was the rightful and legal clerk of said school district at the time of the commencement of this suit, and that this action can be maintained in the name of said district for said book of records, then judgment is to be rendered for the plaintiffs for one dollar damages and costs. Otherwise the case is to stand for trial.

N. D. Appleton and *I. S. Kimball*, counsel for the plaintiffs.

I. The first question upon the agreed statement is this: Was John Shaw the rightful and legal clerk of said district at the commencement of this suit, he having been chosen at the district meeting, holden on the 20th of March, 1855, which meeting was called by a warrant issued by Porter Willard, the then agent of said district?

Willard being agent, as the case shows, it was made his *duty*, by the statute of 1850, ch. 193, art. 6, s. 1, in the month of March or April, annually, to call district meetings for the choice of agents and other business, by causing notice to be given as provided in the fifth and sixth sections of article second of the same act, the town having failed to choose school agents.

This *duty* Willard, the agent, performed by issuing his warrant on the 13th of March, 1855, the day after the town meeting was holden, calling a meeting of the district, to be

holden on the 20th of March, for the purpose of choosing a clerk and agent of said district. At this meeting said John Shaw was duly elected clerk and sworn. Said Shaw was, therefore, the rightful clerk of said district when this suit was commenced, unless the meeting called by the selectmen and holden on the 19th of March, (at which time the defendant was elected clerk of said district,) was legal, and authorized by the statute.

We contend that the meeting called by the selectmen was unauthorized.

The legislature having introduced a *new provision* in the act of 1850, making it imperative on the agent to call the annual meeting in the month of March or April, and making it his specific duty to do it, necessarily limited the power of the selectmen and restricted them in its exercise, until the agent had *refused* or *neglected* to perform his duty as required. In this case there was no delay or negligence on the part of the agent. He called the meeting the day after the annual town meeting, when it was ascertained that the choice of school agents was left with the districts. And the case shows, that for five years previous it had been usual to call the annual school district meetings soon after the annual town meeting, and in the same month.

Any other construction to the statute than this, would create a conflict of power between the selectmen and agents, and lead to confusion, uncertainty, and embarrassment. When the legislature made it the duty of the agent to call the annual meeting within a *certain fixed time*, it could never have intended that the same power should be exercised during the same period by the selectmen, and in construing statutes the intention is to prevail, if it can be ascertained.

And if there is an apparent inconsistency in different parts of the same statute, such a construction should be given as to reconcile the different provisions, if possible.

And if the general meaning and object of a statute should be inconsistent with the literal import of any particular clause or section, such clause or section must be construed

according to the spirit of the act. Dane's Digest, 6, 596; *Menden* v. *Worcester*, 10 Pick. R., 235; *Commonwealth* v. *Cambridge*, 20 Pick. R., 267; *Winslow* v. *Kimball*, 25 Maine R., 493.

It was undoubtedly the object of the legislature, by this new provision in the act of 1850, to secure greater regularity and uniformity in the proceedings of school districts than had before existed, and to insure greater punctuality in calling annual district meetings, by making it the duty of the agent to attend to it within a specified time. And the practical operation and effect has been found useful and beneficial.

The general authority of the selectmen to call meetings of the districts on other occasions, and in special cases, where there is no agent, or he neglects his duty, is proper and necessary, and was intended to apply and be exercised so as not to interfere with that of agents. Besides, the language of the fifth section of article two does not require selectmen to perform this as a *duty*, but says that district meetings "*may be called*" by them, &c.

But the legislature has removed whatever doubt might exist in relation to this matter, by an act entitled an act explanatory of section five, article two, of the act to provide for the education of youth, passed March 25, 1856. By this act, "school district meetings, on the application of three or more of the legal voters in such districts, respectively stating the name and objects of the proposed meeting, may be called by the town containing such district, whenever the agent or agents of such district, if any have been appointed, shall neglect or refuse so to do."

This explanatory act shows conclusively what the intention of the legislature was. It is not an alteration of the previous law, but an exposition or interpretation of it.

II. This action of replevin can be maintained in the name of the district. The case finds that the book of records replevined belongs to the plaintiffs, and they having the right of property in it, are entitled to recover in this action.

Stebbins v. *Jennings*, 10 Pick. R., 172; *Sawyer* v. *Baldwin*, 11 Pick. R., 492. This was replevin for church records, and sustained. *Sudbury* v. *Stearns*, 21 Pick. R., 148. This case was trover for the book of records of the first parish in Sudbury. MORETON, J., in delivering the opinion of the court, says, we have no doubt that either trover or replevin will lie in this case, and cites 11 Pick. R., 492. The *property* of the records is in the parish. The clerk is the officer designated by law to hold and keep them; and if any stranger gets possession of them, the parish may take them from him by the proper action, or recover damage for their destruction or detention. *Ingraham* v. *Morton*, 15 Maine R., 373.

If it is said that it appears by the case, that the agent who was chosen in 1854 was not legally chosen agent, because not elected at a district meeting called on the application of three legal voters, and so not authorized to call the meeting in April, 1855, even if there had been an application in writing to him by three or more voters in the district, our answer is, that that meeting of 1854 was called by John Shaw, the agent of the previous year, chosen at the annual meeting in 1853, and who had also been chosen at the previous meetings in 1852 and 1851, as agent of the district; that being agent for three years, and acting as agent, and coming into office under color of an election, he was agent *de facto*, and that his acts are valid; and that Willard, who was chosen in 1854, and duly sworn, was agent *de facto*, and as such could call the meeting in 1855. *Brown* v. *Lunt*, 37 Maine R., 423, and cases there cited; *Tucker* v. *Aiken et als.*, 7 N. H. R., 113.

In reply to the argument of the defendant, we say that the case shows, that subsequent to 1849 the annual meetings for the choice of officers had been called by the agents of the district, and that subsequent to the law of 1850, the annual meetings had been called by the agents, in pursuance of art. 6, s. 1, of the law of 1850, which, we say, makes it the *duty* of the agent to call district meetings in the month of March

or April, of his own motion, without any application from the voters of the district, and that since the law of 1850 the selectmen have not the *concurrent* power to call such meetings, unless the agent *refuses* or *neglects* to do it.

The statute authorizing selectmen to call district meetings, by art. 2, s. 5, makes it *discretionary* with them to call such meetings, and provides that the three legal voters applying to them to call a meeting should state the *reasons* for calling the same, as well as the *objects* of the proposed meeting.

The object of the law of 1850 was to insure the organization of the school districts, by having agents and clerks chosen within a fixed period, and hence it imposed it as a *duty* on agents to call such meetings within such limits as the statute provides. But if this duty was neglected, or if the agent refused to call the annual meeting, then and then only could the selectmen have power to interfere, and on the application of three legal voters, to supply the omissions of the agent. The authority of the selectmen extends also to occasions when *special* meetings are required or desired by the voters of the district, and the agent, on application to him, refuses to call a meeting.

The difficulties to be avoided by our construction of the statute are apparent, and are shown by the facts in this case. The case shows, that there are now two distinct organizations in this district, where there were in 1855 but twenty-two legal voters; that a minority of six of them applied to the selectmen for a warrant, and caused the notices of the meeting called by the selectmen to be so posted up, as that a majority of the district had no notice in fact of the meeting, and evidently intending to steal a march upon the agent and a majority of the district, and thus get officers not the choice of the district. This *first meeting*, as the counsel term it, we say, was a fraud upon the district, called and notified secretly, and at a time when the agent had omitted no part of his duty as required by the act of 1850, for he moved in calling the annual meeting as soon as he could reasonably be expected to do, by calling the district meeting and issuing

his warrant therefor, the day after the town meeting was dissolved.

Such a construction should be given to the statute in relation to this matter, as to prevent the occurrence of such difficulties and sinister designs as this case develops.

The case of *Fletcher* v. *Lincolnville* is not applicable to this case, because the duties prescribed by the statute of 1834, and adopted in the Revised Statutes, to school agents, were different from those of the statutes of 1850. That decision was right as the law then stood, but a new provision was introduced into the law of 1850, which makes it the *duty* of agents to call school meetings in March or April of each year, without requiring a written application from three or more voters of the district.

As to the "explanatory" act of 1856, commented on by the counsel, we have only to say, that the court is always desirous to put such a construction on legislative acts, as will carry out the *intention* of the legislature. And if there was any doubt or ambiguity in the language of the statute of 1850, (which we deny,) it was very proper for the legislature to remove them by an explanatory act.

It is proper to add, that this *exlpanatory* act was passed without the *knowledge* of the *counsel for the plaintiffs* in this case, or any person connected with it.

Asa Low, counsel for the defendant.

1. The plaintiffs must have had a right to the possession of the property at the taking or detention of the same. *Gates* v. *Gates,* 15 Mass. R., 310; *Baker and als.* v. *Falls,* 16 Mass. R., 488; *Collins* v. *Evans,* 15 Pick. R., 63; *Wheeler* v. *Train,* 3 Pick. R., 255.

The district in their corporate capacity had no right to possession of the book of records mentioned in the plaintiff's writ. The possession belonged to the legal clerk. If that person was John Shaw, as is contended by the plaintiffs, and which we deny, he, and he alone could maintain an action of this kind. Replevin lies for a book of records, but it must

be brought in the name of the person that has the right to the legal custody of the records, the proper officer in whose custody the records belong. *Sawyer* v. *Baldwin*, 11 Pick. R., 492; *Baker and al.* v. *Falls*, 16 Mass. R., 488.

The R. S., ch. 130, s. 8, says, "When any goods shall be unlawfully detained from the owner or the person entitled to the possession thereof, &c., may be replevined," thus clearly showing that the person who has the right to the possession should bring the suit. A person or corporation may be the owner of personal property, but not have the right to the possession. Therefore, I contend this action cannot be maintained in the name of the district.

2. The great question in this suit is, who was clerk of this district at the time this suit was commenced, John Shaw, or the defendant, or, according to the agreement in this case, was John Shaw the rightful and legal clerk of the district at the time?

The defendant was chosen at the first meeting held in the district for the year 1855, which meeting was a legal meeting, called according to law. Was not he the clerk of the district?

The statute of 1850, ch. 193, art. 2, s. 5 and 6, gives the mode of calling school district meetings, and the manner of notifying. They may be called by the selectmen of the town upon the application of three or more of the legal voters of said district.

The meeting at which the defendant was chosen was called in this way; and being the first meeting held in the district for the year, the time prescribed by law for choosing a clerk. Statute of 1850, ch. 193, art. 2, s. 8.

We say John Shaw was not the rightful and legal clerk of said district; first, because the defendant was the legal clerk, chosen on the 19th of March, 1855, and he would hold his office during the year ensuing. Second, because the meeting at which said Shaw purports to have been chosen, was not called pursuant to law; that is, there was no application in writing from three or more legal voters in the district.

An agent cannot call a legal meeting without such application. *Fletcher* v. *Lincolnville*, 20 Maine R., 439; Laws of 1850, s. 5 and 6, above referred to. And we say that Porter Willard was not the legal agent to call such meetings, if he had had an application, because the meeting at which he was chosen in 1854 was called without such application as the law required. Neither had there been any legal meeting for the choice of officers since 1849. Therefore there was no agent to call a meeting, and no legal meeting could be called except by the selectmen. And John Shaw could not be the rightful and legal clerk of the district. Statute of 1850, ch. 193, art. 6, s. 1, defines the powers and duties of school agents. First, in the month of March or April annually, to call district meetings for the choice of agents, and for other business, by causing notice to be given as provided in the 5th and 6th sections of article 2 of this act. The said 5th section providing for the application; then it is his duty to call the meeting according to the 6th section referred to.

Then, we say, if the agent did have the power to call the meeting without an application, it did not take away the power of the selectmen to call a meeting upon an application in writing of three or more legal voters in the district.

And as the meeting called upon the 19th of March, A. D. 1855, which was duly organized by the choice of a moderator, and the defendant chosen clerk and duly sworn, would be a bar to the choice of John Shaw as clerk, chosen on the 20th of said March.

Therefore, if an action of this kind in other cases could be maintained in the name of the district, according to the agreement of the parties, John Shaw, not being the rightful and legal clerk of the district at the time the suit was commenced, judgment should not be rendered for the plaintiffs, but the case should stand for trial.

This case should be decided according to the law of 1850, above referred to; that the act of 1856, ch. 225, although it is headed an explanatory act of ch. 193, above referred to, is ana mendment to the law of 1850, entitled "of the education

of youth." That the expounding of the laws of this state belong to this court, and not to the legislature.

RICE, J. Replevin to recover possession of the records of the district alleged to have been unlawfully taken and detained by the defendant. To maintain replevin there must have been a right of possession in the plaintiffs at the time of taking or detention. That right may follow either the general or special ownership of property. That the general property in the records in dispute was, and is, in the plaintiffs, is not controverted; but it is asserted by the defendant that he is clerk of the district, and in that capacity has a special property in the records, and the right to their custody and possession; and further, if he should be adjudged not to be the legal clerk of the district, then he contends that the right of possession is in one Shaw, whom the plaintiffs affirm to be the legal clerk; and therefore, in either case the action cannot be maintained.

The clerk is the officer and servant of the district. As between the district and a stranger, the possession of the records by the clerk is the possession of the district, and replevin may be maintained in the name of the corporation. *First Parish in Sudbury* v. *Stearns*, 21 Pick. R., 148. If the question of right to possession should arise between the district and their legally elected and qualified clerk, the result would be different. The action is therefore rightfully brought, and may be maintained, if the defendant was not the legal clerk of the district.

By s. 3d, art. 1, ch. 193, laws of 1850, it is provided that any town at its annual meeting for the choice of town officers, may vote to choose, and in such case shall choose an agent for each school district in such town.

By s. 10, art. 2, every school district, at its annual meeting, shall choose by ballot a school agent, unless such agent shall be chosen by the town, as provided in article first, section third.

Section 5, in article 2, provides that school district meet-

ings, on the written application of any three or more legal voters in such districts, respectively, stating the reasons and objects of the proposed meetings, may be called by the selectmen of the town containing such district; or by the school district agent or agents, if any have been appointed.

Section six points out the manner in which the selectmen or district agent, as the case may be, shall give notice, "on receiving any such application."

Article 6, s. 1, provides that the duties and powers of school agents shall be as follows:

First. In the month of March or April, annually, to call district meetings for the choice of agents, and for other business, by causing notice to be given as provided in the fifth and sixth sections of article second of this act.

The plaintiffs contend that this last section authorizes agents to call meetings of the district in the months of March or April, on his own motion, and without the written application of three or more of the legal voters of the district. The whole statute must be construed together, and if practicable, force given to all its provisions. The agent is directed to call meetings in March or April, by giving notice *as provided in the fifth and sixth sections of article second of this act.*

Section fifth, already cited, authorizes the calling of meetings on the written application of three or more legal voters, by the selectmen or school agent, and section sixth prescribes the manner in which notice shall be given on the receipt of *such written application,* by the selectmen or agent.

By this reference we think it is manifest that the legislature intended that the agent should be governed by the provisions contained in the fifth section, as well as those contained in the sixth, when he assumes to act; otherwise the reference to the fifth section is wholly unmeaning.

The statute provides two modes in which the meetings of school districts may be legally called, and as it stood before the passage of the act of 1856, ch. 225, did not give one

mode precedence over the other. The result is, that where both modes were resorted to by different parties in the same district, to accomplish the same objects, the meeting which was first legally held had the precedence. Since the passage of the act of 1856, no such opportunity for conflicting meetings has existe[1].

It is contended by the plaintiffs, that the act of 1856, ch. 225, was intended to be explanatory of the provisions of the act of 1850, ch. 193, which we have already cited, and should control its construction. Such doctrine is inadmissible. Legislatures enact laws—courts expound them.

Those meetings of the district which have been called by the school agent, on his own motion, without the written application of three or more legal voters of the district, were not called in conformity with the requirements of the statute, and the acts of officers chosen at such meetings would be binding only as the acts of officers *de facto*.

The defendant does not show a legal election. The application to the selectmen to call the meeting at which he was elected, appears to have been in due form, but it was premature, bearing date two days before the town meeting was held, in March, at which it would have been determined whether the town would elect school agents, or permit the several school districts to exercise that right, and apparently before the selectmen were chosen who assumed to act upon that application. Any action upon that application was, under such circumstances, inoperative and void. According to the agreement of the parties, the action must stand for trial.

TENNEY, C. J., APPLETON, CUTTING, MAY and DAVIS, J. J., concurred in the result.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

WHO HEARD AND DETERMINED THE CASES

FOR THE

MIDDLE DISTRICT,

1857.

———o———

HON. JOHN S. TENNEY, LL. D., CHIEF JUSTICE.
HON. RICHARD D. RICE, J.
HON. JOSHUA W. HATHAWAY, J.
HON. SETH MAY, J.
HON. DANIEL GOODENOW, J.
HON. WOODBURY DAVIS, J.

ALL OF WHOM CONCURRED IN THE OPINIONS IN THE CASES

FOLLOWING, UNLESS OTHERWISE INDICATED.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1857.

———o———

COUNTY OF KENNEBEC.

———o———

JOSEPH BURTON *versus* THE COUNTY OF KENNEBEC.

The amendments to the constitution under the resolves of March 17, 1855, contain no express abrogation of any of the provisions of that instrument, except as to the mode of filling the offices referred to, and the old mode of appointment is not repealed any farther than it interferes with the practical operation of the mode prescribed in the same amendments.

Offices which had been filled by executive appointment, and which were afterwards to be filled by vote of the people, under the amendments which became parts of the constitution, before these officers could act by virtue of their election, were properly filled during this interval by executive authority.

The following facts in this case were agreed by the parties.

This is an action to recover eight months' salary, from February 1, A. D. 1856, to October 1, A. D., 1856, as register of probate within and for the county of Kennebec; on the 28th day of February, A. D., 1854, the plaintiff was duly commissioned, and on the first day of March following qualified, to act as register aforesaid; on the 17th of March, 1855, the legislature passed certain resolves for an amendment of the constitution relating to the elective franchise; on the 19th day of November, 1855, a report was made in council relating to the votes of the people upon the proposed amend-

ments; on the 2d day of January, 1856, a message was sent to the legislature by Governor Morrill, transmitting the report of council upon the proposed amendments; on the 28th day of February, 1856, the legislature passed a resolve declaratory of amendments of the constitution; on the 23d day of January, 1856, Francis Davis was commissioned by the governor and council, register of probate for said county; on the 27th day of January, 1856, he was qualified, and on the first day of February, 1856, entered the probate office and demanded possession of the records, &c.; the plaintiff declined to give him possession, claiming himself to be register, said he was ready to perform the duties of said office, and should claim the payment of the salary; Davis insisted upon taking possession, and did so accordingly; the plaintiff left the office under protest, still claiming to be register, waiving no rights, expressing his readiness to perform the duties of said office, and notifying the Judge of Probate to that effect; said Davis remained in possession of the office, performing the duties thereof and receiving his pay therefor, until the first day of January, A. D. 1857, when he was succeeded by the plaintiff, by virtue of an election by the people under the constitution as amended.

The plaintiff made demand of the county treasurer for the amount of salary sued for prior to the commencement of this action.

R. H. Vose, counsel for the plaintiff.

This is an action of assumpsit brought by the plaintiff to recover a portion of his salary as register of probate. It is admitted that he was duly commissioned for said office on the 28th day of February, A. D. 1854, and that on the first day of March following, having been duly qualified, he entered upon the discharge of his duties; that he continued to perform them until the first day of February, 1856, when he was ousted by Francis Davis, who claimed to be register, by virtue of a commission bearing date January 23, 1856. It is also admitted that the plaintiff was ready to perform the

duties of said office; that he claimed the right, and the payment of the salary; that he notified the Judge of Probate to that effect, and only left the office under protest. The salary of the register is a sum certain. It is paid by the treasurer quarterly, upon application by the register, without warrant or order from any one; and such has been the uniform practice in this county, with one solitary exception; during the pendency of this controversy, the treasurer being in doubt to whom the salary belonged, made one payment to Davis, under direction from the county commissioners. There is only one contingency named in the Revised Statutes, where the register, in order to receive his salary, is obliged to present any authority, except his own receipt. R. S., ch. 150, ss. 5 and 6, provide that whenever the register of probate shall be unable from sickness, or from any other cause shall neglect to perform his duties, the Judge of Probate for the county shall certify to the treasurer the fact, and the individual who has performed the duties, and the treasurer shall pay the same; in all other cases, in the absence of any positive statute, the practice is uniform, and is in accordance with section 1, of the same chapter, which provides that he shall receive a sum certain, in quarterly payments, out of the county treasury, to pay to the register upon his application alone. In the present case, according to the facts admitted, a demand was duly made upon the treasurer, and payment refused, prior to the commencement of this action. If it be said that we have mistaken our remedy, that *mandamus* is the only proper process to try this question, our answer is, that where a party has been in possession of an office, he may try his right by an action for the profits, and is not obliged to resort to the process of *mandamus*. Com. Dig., vol. 5, p. 31, note 3, T. R., 575.

But should the court otherwise determine as to the proper remedy in such case, it is to be hoped that the main question at issue between the parties may now be determined, as a decision upon the merits, whatever may be the result, will preclude the necessity of further litigation. If against the

plaintiff, of course it is decisive; if in his favor, the county will make payment without further controversy. We come, then, directly to the real question in issue: Was the plaintiff register of probate for the county of Kennebec, during the year 1856; or did he cease to be such, by virtue of the commission and qualification of Davis? Constitution of Maine, art. 10, s. 4, provides that the legislature, whenever two-thirds of both houses shall deem it necessary, may propose amendments to this constitution; and when any amendments shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at their next annual meeting in the month of September, to give in their votes on the question whether such amendment shall be made; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this constitution.

On the 18th of March, 1855, the legislature, in accordance with the above provision, passed certain resolves providing for certain amendments of the constitution relating to the elective franchise.

The first resolve proposes to amend the eighth section of the first part of article five, by taking from the governor and council the power of appointment of certain civil officers, amongst whom registers of probate are particularly designated; and by adding to the sixth article an additional section, providing for the election of registers of probate, and certain other officers by the people.

The second resolve provides for notice to the several cities, towns and plantations, to vote upon the question whether or not certain officers, (among whom are registers of probate,) shall be elected by the people; *these being the only questions specifically submitted to them for their action,* the resolve then proceeds: "and the ballots shall be received, sorted, counted and declared, in open ward, town

and plantation meetings; and lists shall be made out of the votes, by the aldermen, selectmen, and assessors, and clerks of the several cities, towns and plantations, and returned to the office of the Secretary of State, in the same manner as votes for senators; and the governor and council shall count the same, and make return thereof to the next legislature; and if a majority of the votes are in favor of any of said amendments, the constitution shall be amended accordingly."

The last resolve provides that the Secretary of State shall furnish blank returns to the several cities, towns and plantations, in conformity with the foregoing resolves, accompanied with a copy thereof. On the 19th of November, 1855, a report was made in council, relating to the votes of the people upon the amendments proposed; and upon the second day of January, 1856, a message was sent to the legislature by the governor, transmitting that report, therein stating the fact that a majority of inhabitants voting upon the several proposed amendments, had been ascertained to be in favor of adopting the same, and thereupon declaring the constitution amended. On the 28th of February, 1856, the legislature passed a resolve declaratory of these amendments.

These are the facts, and upon these, two questions are presented for the consideration of the court.

1st. At what *time* was the constitution amended?

2d. Did the amendment affect the appointing power of the governor and council, prior to an election, under the constitution as amended?

The constitution itself answers the first question: when it shall *appear* that a majority of the inhabitants, voting on the questions, were in favor of the amendments, then such amendments shall become a part of the constitution. Thus far it provides, and no farther; it does not require a proclamation by the governor; nor a declaratory resolve by the legislature. Amendments have been made, and constitute a part of our present constitution, without any other evidence of the fact than a simple entry upon the legislative journals; nay, farther, the most important amendment ever made to

the constitution—the amendment of 1839, limiting the tenure of the judicial office, an amendment under which the present members of the court hold their seats, and without which we have no Supreme Judicial Court—was made to *appear* by a mere entry of the acceptance of the report of a committee, upon the journal of the Senate alone.

The House made no record of the fact.

And is this court prepared to oust itself of its own jurisdiction, because there was no legislative resolve declaratory of this amendment.

How the will of the people is to be ascertained and made to appear, is to be pointed out and provided for in the resolves themselves submitting the proposed amendments.

From the necessity of the case, this cannot be left to a succeeding legislature—accordingly the resolves of 1855 provide that the votes shall be returned to the office of the secretary of state, in the same manner as votes for senators, and the governor and council shall count the same, and make return thereof to the next legislature, and if a majority of the votes are in favor of any of said amendments, the constitution shall be amended accordingly.

Thus the legislature gave authority to the governor and council to examine the returns, to count the votes, and to ascertain the fact whether or not a majority were in favor of the proposed amendments. This duty they performed—these facts they ascertained, and by a report in council, a matter of record upon their own journal declared, that inasmuch as it appeared to them that a majority of the inhabitants voting upon the several questions submitted were in favor of the amendments proposed, the constitution was thereby amended.

What else remained to be done? "That they should make return thereof to the next legislature"—not of the votes, but of the result of their proceedings in the premises; all this was done—what more was necessary in order to comply with the resolves of 1855? So far as the question of amendment is concerned, surely nothing; the subsequent declara-

tion of the legislature was entirely unnecessary—it was a mere announcement of a fact already known, which must still have existed and appeared as a fact, although no such declaration had ever been made. We contend, therefore, that the constitution was amended when the report of the governor and council was made and returned to the legislature.

The more important question remains to be considered. Did the amendment affect the appointing power of the governor and council prior to an election under the constitution as amended?

Section 8, part 1st, article 5, provides that the governor, by and with the advice of the council, shall appoint certain officers therein enumerated, amongst whom are registers of probate. The first amendment proposed expressly strikes out and annuls so much of this section as relates to the appointment of registers of probate, and takes away the power from the governor and council to appoint these officers, except in case of a vacancy by death, resignation, or otherwise. It follows then, as a necessary consequence, that from the time when the constitution is amended, it is as if the clause now stricken out had never been inserted—the power once conferred is now annulled, and the very exception already stated, that the governor may appoint in case a vacancy shall occur from death, resignation, or otherwise, clearly shows that he cannot himself create a vacancy by removal. He cannot remove an officer by virtue of section 6, article 9, of the constitution, which provides that the tenure of all offices which are not, or shall not otherwise be provided for, shall be during the pleasure of the governor and council, because that section refers to offices which the governor and council have power to fill; and the amendment having already annulled the power of appointment, has also annulled the power to remove from the office in question.

But it may be suggested that there was no direct vote taken upon the first proposed amendment; our answer is, that such vote was not necessary, nor required by the re-

solves submitting the amendments to the people—the questions upon which the votes are to be cast are all given, and this particular amendment is not one of them. Yet this amendment is to stand or fall with the rest, as a part and parcel thereof—if they fail, that fails—if they are adopted, this is adopted, as a necessary consequence. The legislature might have provided that a vote upon the first amendment should have settled every question, or they might do as they have done—provide, that by a vote upon each officer, and a majority being found in favor of the election of each, the constitution should be amended by striking out the appointing power in such cases, in accordance with the first amendment.

This amendment having then been adopted, and become a part of the constitution, the power of the executive in relation to the office of register of probate having been anulled, except in case of a vacancy as before named, the plaintiff was entitled to hold his office, and to receive the emoluments thereof, until he might be superseded by an election of the people.

We are fully sustained in this view of the case by the opinion of the Supreme Court of Massachusetts. 3 Gray's R., 603.

The Legislature of Massachusetts for the year 1855, had proposed certain amendments of the constitution to the people, for their ratification; one for the election of certain officers by the people, among whom were the registers of probate; and it is rather a curious fact, that one of the resolves provides, that the governor and council shall open and count the votes, and if it shall *appear* that a majority have voted in favor of a proposed amendment, it shall be enrolled and published as a part of the constitution—thereby showing that a thing may *appear* before its appearance has been publicly declared.

But the point to which we wish to call the attention of the court, is this—that there is no striking out of any portion or clause of their constitution, as is the case with our first

proposed amendment—there is no express annulling; it is only to be arrived at by implication.

Under their amendments the very question we are now considering, was answered by the court.

The effect of the amendment upon the power of removal in the governor prior to an election by the people—and the court decide that under their constitution as amended, the power continues to exist until an election takes place; and for what reason? because, they say, "The present amendment contains *no express repeal of pre-existing provisions of the constitution*—it repeals them by necessary implication, by providing *another and different mode of filling these offices*—but it cannot have that effect until it comes practically into operation."

Again, "This necessarily results from the reasons before stated: the amendment in question contains *no annulling, revoking, or repealing clause whatever*; and does not in *terms annul any provision in the constitution;* but it effects such repeal by superseding it, and by providing another mode of filling these offices, incompatible with such pre-existing provisions; as therefore the amendment supersedes and annuls the old provisions of the constitution, by its practical working, in filling these offices in another mode, it follows that it will have that effect, when only in the course of its own regular operation the result has been accomplished." Is it not clearly to be inferred from this opinion, that if the amendment, like our first, had contained an express repeal of pre-existing provisions of the constitution, that their opinion would have been exactly the reverse? In their case the original provisions are left untouched, until the amendment by actual operation supersedes them. In ours, on the other hand, they are stricken out at once. It is as if they never had existed, and when the amendment became a part of the constitution, the attempt to exercise a power no longer in existence, was an act of usurpation, and clearly unconstitutional.

We come, therefore, to the conclusion that the constitu-

tion was amended when the fact was made to *appear* by the report of the governor and council.

That it took effect at *once*, upon the power of removal of certain officers therein named, including that of the register of probate, by striking out of the constitution the power to fill such offices. That the power of the governor to remove, must of necessity be limited to such offices as he had the power to fill. That the plaintiff, being in office under a commission which had yet some two years to run, was entitled to hold the same, and to receive the salary thereof until the first day of January, 1857, when, under the constitution as amended, he might be rightfully superseded by an election of the people.

S. Lancaster, counsel for the defendant.

The plaintiff claims to recover, not for services performed, but for services which he was ready to perform, as he alleges, as register of probate for the county of Kennebec, and insists that his claim should be allowed, notwithstanding Francis Davis, during the same period of time, acted in that capacity, doing the duties of the office, and receiving his pay therefor under a commission of later date than the plaintiff's.

The first, and perhaps the only answer that need be made to this, is, that however the law may be in relation to the validity of the commissions of Mr. Davis and the plaintiff, as to which should supersede the other, this action cannot be maintained. This is assumpsit upon an account annexed and for money had and received. *Now there is no contract here expressed or implied between these parties.* The defendant never employed the plaintiff—never promised to pay him. The plaintiff's office is created by the constitution, and he was appointed by the governor, and while he filled it he was a public officer, carrying into effect a public law for the public good. *Emerson* v. *Washington County*, 9 Greenl. R., 98.

Then as the plaintiff was never employed by the defendant, as defendant never promised to pay him, he will not ex-

pect to recover on the ground of an express promise, and any implied promise is sufficiently negatived by the fact that the defendant paid Mr. Davis as his salary became due. This would seem to be a sufficient answer to any implied promise under either count. When the action was brought there was no money in the hands of the county treasurer for the salary of the register of probate for the time embraced in the plaintiff's writ. It had been paid to Mr. Davis. So far, this argument would seem to be pertinent and decisive, even if the plaintiff had performed the duties of the office, and had not received his pay. But in this case the plaintiff rendered no service in that office for the time covered by his suit, but on the contrary the place was filled during the same time by another man, and he was paid the salary, the first payment having been made by the *written order* of the county commissioners, thereby putting an *express* negative upon every sort of promise either express or implied; for in deciding to pay Davis, they *decided not to pay the plaintiff.* Here, then, was an express refusal to pay the plaintiff. If the plaintiff ever had any rights in the premises, this is not his remedy. He should have begun earlier and by a different process; by petition for a *mandamus*, or by taking the requisite measures to obtain a process of *quo warranto.* But the plaintiff had no rights after Mr. Davis was appointed, to be redressed in any form before any court.

The papers on the face show that the plaintiff did not hold the office during the time for which he has sued. He attempts to avoid this by contending that his commission was in full force, while that of Mr. Davis was inoperative and void. His argument is, that the constitution had been changed by the popular vote at the September election in 1855, whereby all authority to appoint to that office had been taken from the governor, so that at the time Mr. Davis was appointed the governor had no authority to make the appointment.

The presumption is that Mr. Davis was legally appointed,

and the burden is on the plaintiff to make out *a clear case* to the contrary, before he can expect the court to decide in his favor.

The argument he uses in support of his propositions seems to be a *felo de se*, for it destroys itself. I do not find anything which calls for an examination of the argument to support the plaintiff's claim, it appearing to me at best to be nothing but a bold assertion, without precedent or authority, or any sound or practical construction to maintain it.

Now if the constitution had become so amended at the September election in 1855, or when Governor Morrill made a proclamation which he had *no right to make*, then it would follow, not only that the commission of Mr. Davis was void, but also that the plaintiff's would share the same fate, for when that power was stricken from the constitution, all commissions depending upon it must necessarily have fallen with it. So surely as the branches cannot survive when the axe is laid at the root of the tree, or streams flow when the fountain head is dried up, just so surely must all commissions have perished with the power that gave them birth. But the constitution had not been so amended at the time Mr. Davis received his appointment.

The only provision for amending it is found in s. 4, article 10, which entrusts this power to the legislative department.

This section is as follows:

"SECT. 4. The legislature, whenever two-thirds of both houses shall deem it necessary, may propose amendments to this constitution, and when any amendments shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at their next annual meetings in the month of September, to give in their votes on the question whether such amendment shall be made; and if it shall appear that a majority of the inhabitants voting on the

question are in favor of such amendment it shall become a part of this constitution."

Am I not right in saying that this section confides to the *legislature* the business of amending the constitution—or perhaps I should say of proposing amendments and of supervising their progress to the end?

The legislature, when two thirds of both houses *deem it necessary*, may propose amendments. Here two thirds of both houses are first to concur in the opinion that it *is necessary*, before any amendment can be proposed; then a resolution is to be sent out submitting it to the people, and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this constitution.

Appear to whom? To whom but those who are entrusted with the care and supervision of that business? Now if the legislature of 1855, in the resolve submitting the proposed amendments to the people, had required nothing more than that the votes should be returned to the office of the secretary of state, then what measures would have been required, and by whom, in order to determine whether the amendments had been adopted by the people? To whom, in that case, must it have been made to appear that a majority voting on the question were in favor of the amendments? I think no one will deny that then the legislature would have been required to ascertain whether the amendments had received a majority of the votes thrown on the question. This is the same thing as saying that the constitution contemplates that it should be made to appear *to the legislature*, that a majority of those voting had voted for the amendments, and that legally—which I think is very plain. The constitution does not contemplate or recognize any other body than the legislature as having aught to do with the business; it makes it the duty of the legislature to do this work. If this be so, then the next question that arises is, did the legislature of 1855, in their resolves accompanying the proposed amendments, do anything to change the course

of procedure at all? I will not discuss the question whether it would have been competent for them to do so, as I do not find *any evidence* in the resolves of *any such intention.* The votes were required to be returned to the office of the secretary of state in the same manner as votes for senators; and the governor and council were to count the same and make return thereof to the next legislature; and if a majority of the votes were in favor of any of said amendments, the constitution was to be amended accordingly. Now, I think nothing can be more palpable, than that the service required of the governor and council was purely ministerial, and that not final, but only in aid of the next legislature. If this were not so, if a different purpose were intended, why did not the resolve so declare? Why not authorize the governor and council to look into the *legality of the voting* and to make proclamation? Nothing of this kind was done, but, on the contrary, the governor and council were simply to count the votes and make return thereof to the next legislature. Why to the next legislature but for their action thereon? Again, *after* the governor and council had so counted the votes and made return thereof to the legislature, the resolve then adds, "and if a majority of the votes are in favor of any of said amendments, the constitution shall be amended accordingly." What can this mean but that if *after* the return is so made to the legislature, *they should find* a majority of votes in favor of any of said amendments, the constitution should be amended accordingly?

This view is confirmed by the following provision in the resolve: "And in all cases of elections provided for in this resolve, the first elections shall take place on the days and times herein prescribed, occurring next after the amendment providing for such elections, shall have been declared by the legislature to have been adopted as a part of the constitution." This clause makes it the duty of the legislature, in a certain contingency, to declare the proposed amendments to have become a part of the constitution. When were they to do this? I answer, when it appeared to them that the

amendments had received a majority of the votes legally thrown on that question, and this would be when they had ascertained that fact by such means as they saw fit to employ. This seems to be the view which the legislature has uniformly taken, both of its duties and its powers, in relation to any proposed amendments of the constitution. In every instance a committee has been appointed to ascertain whether the amendments had received a majority of the votes thrown on the question; this committee has reported, and the legislature has acted on the report; and this, as I have endeavored to show, is what the constitution contemplated.

When it had been made so to appear to the legislature, and they had declared the constitution amended accordingly, at what time would the amendments take effect and become operative? Clearly on the first day of January, 1857, this being the commencement of the term of such as were to be elected by the people—they were to be elected at the annual election in September next after the legislature had declared the amendments to have been adopted, and their terms were to commence on the first day of January following; in the mean time the power to appoint and remove must of necessity have remained in the governor as before. This seems to be the only practical view which the case admits of, and such as the Supreme Court of Massachusetts have taken of a similar case, which arose on amendments to the constitution of that commonwealth.

Upon any other view it would be impracticable to administer the government; for if the amendments took effect and became operative, either when the people voted, or when the governor and council counted, or when the legislature made the requisite declaration, then, as we have endeavored to show, all commissions which issued from the governor, were that moment rendered null and void, and the vacancies occasioned thereby could only be filled by the people at the next September election, and those thus chosen could not enter upon the duties of their offices till the first day of January following—thus vacancies would be created that could not

be filled for all that time. If it should be said that the amended constitution provides for filling vacancies, in reply I say, that these would not be vacancies occurring under it, but such as arose before these offices were filled in the manner contemplated by it, and so would not come within any of its provisions.

Under such a state of things how could the government get along? I therefore respectfully submit, that the amendments did not become operative till the first day of January, 1857, and that, up to that date, the power to appoint or remove remained with the governor, under the old constitution.

TENNEY, C. J. The plaintiff was commissioned as register of probate for the county of Kennebec, by the executive of the state, on February 28, 1854, and after being qualified according to law, entered upon the discharge of the duties of that office. By the appointment under the constitution and laws of the state, then in force, he was entitled, upon the fulfillment of his trust, to receive the salary provided, for the term of four years from the date of his commission, unless removed, as he might be, at any time by the governor and council.

Resolves, entitled "Resolves providing for an amendment of the constitution, relating to the elective franchise," were passed by the legislature, by two thirds of each branch, on March 17, 1855. These provided for the choice of judges and registers of probate, and of sheriffs, by the people of each county; the first election of these officers to take place at the annual election, on the second Monday of September, next after the amendment, providing for such elections, shall have been declared by the legislature to have been adopted as a part of the constitution; and the persons elected to hold these offices for four years, commencing on the first day of January next succeeding their election.

As early as February 28, 1856, when "the legislature passed a resolve declaratory of amendments of the constitu-

tion," it appeared that a majority of the inhabitants voting on the questions proposed by the resolves of March 17, 1855, were in favor of the amendments, and they became a part of the constitution, according to article 10, section 4, of the constitution of this state. Whether it so appeared, at the time the state of the votes was ascertained by the governor and council, or at the subsequent time, when "a message was sent to the legislature by Governor Morrill, transmitting the report of council upon the proposed amendments," according to a proper construction of said section, is a question which we think is not necessarily involved in a proper decision of this case, and no opinion is expressed thereon, notwithstanding reasons plausible, at least, may exist in favor of the affirmative, in one or the other of the alternatives mentioned.

Each of the amendments proposed in the resolves, having received the requisite majority to make them effectual, became a part of the constitution, at the same time, and before the new provisions could become operative. Elections were to take place, and after the votes were counted, and the choice determined, a still further period was to elapse before the officers elect could commence the discharge of the appropriate duties. And in relation to the offices of judges and registers of probate, and of sheriffs, no election could be declared till the legislature had made some provisions by which the amendments could be practically effective. The time of the first election of those officers depended upon that when the legislature should declare that the amendments had been adopted as a part of the constitution. If this declaration had been postponed till after the annual election on the second Monday of September, 1856, it is not seen in what manner the election of the officers named could have been chosen earlier than the annual election in September of the succeeding year. The amendments as contained in the resolves, made no provision in relation to the place to which the votes should be returned, or by whom counted and declared, and notice given to the persons elected. Herein the

amendments did not differ in character from certain provisions in the original constitution. That became the frame of government, when it appeared to have been adopted by the people, in the mode provided; but in some respects it could not be effectual, till after legislative enactments. As an example of this, we refer to section 1, of article 6, declaring that the judicial power of this state shall be vested in a Supreme Judicial Court, &c. With nothing but the constitution, this provision, important, and it may be said essential to the security of public and individual rights, was lifeless, till the legislature determined the number of judges of that court, and its jurisdiction, or until the executive should make appointment of its members, according to other parts of the constitution.

It is manifest that the additions to the constitution, by the amendments, had no validity at an earlier period than that, when the portion which was stricken out thereby ceased to be a part of that instrument, or the contrary. The parts expunged from the constitution as it formerly was, and those added thereto, in the amendments proposed in the resolves, were designed only to present the reading of the provisions, as they should be under the amendment, and were the same thing as it would have been to have provided, that instead of *such* sections as they stood in the constitution at the time the resolves were passed, the following should be substituted; or that the parts proposed to be changed should be altered, so that they should read as follows. The amendments in the constitution of Massachusetts, adopted in 1855, referred to by the plaintiff's counsel as being essentially distinguished from those of this state, which we are considering, are believed to be in substance precisely similar, though in form they may differ. The amendments of the constitution of this state contain no express repeal of the provisions of the constitution, intended to be changed, more than do the amendments of that of Massachusetts. The terms, "and by striking out the words," used in the resolves cannot be regarded as designed to repeal the then existing provisions

of the constitution, when the parts added could have no such effect. But the new provisions, as a whole, standing as they do, take the place of the old, without the least regard to the distinction between the parts stricken out of the latter, and those added thereto.

The title of the resolves and the provisions therein, when examined together, show clearly that it was the design, at a time subsequent to that when the amendments should become a part of the constitution, that the offices referred to should be filled by popular or legislative election, and not by appointments made by the executive. Was it not intended that the power of the governor and council to make such appointments, and the right of the incumbents in office, under such appointments, to continue therein, should become extinct simultaneously? The expression of the popular voice in elections, which should annul the former, at the same time was to take away the latter. When the executive was deprived of its previous rights in this respect, and relieved from the performance of its former duties therein, as being in contravention of the amended constitution, how could the officers of its appointment hold their places, when the same amended constitution affirms, that the tenure of office shall be under the declaration of the people's will, as provided therein? If the former authority of the governor and council was struck down by the amendments, on what principle can the tenure of office longer survive, irrevocable, when that tenure was by constitutional provisions which have been annulled?

The conclusion, to our minds, is irresistible, that the rights of the governor and council to appoint judges and registers of probate, and sheriffs, and the rights of those officers under their commissions, were swept away by the amendments, at one and the same time.

This brings us to the inquiry, at what time did these rights cease? If they ceased at the time when the governor and council ascertained by counting the votes, that a majority of the inhabitants voting, was in favor of the amend-

ments, or when the report of the council upon the proposed amendments was transmitted to the legislature, the plaintiff has no cause of action, as he makes no claim for any part of his salary which accrued prior to February 1, 1856. If the authority of the executive, and the rights of the plaintiff continued till the legislative declaration that the amendments were adopted, unaffected by those amendments, provided there had been no new executive appointment, the action of the governor and council in removing was constitutional, and this suit must fail.

But it is not contended by either party, that the offices of judge and register of probate, and of sheriff, were suspended from the time when the amendments became a part of the constitution, till the time when these officers elected by the people, were entitled to assume the duties thereof. The discharge of these duties is so important to the community, that a different construction should not be adopted, unless the language of the resolves absolutely demands it.

The resolves have provided no mode by which the legislature could have caused the performance of the duties of these offices, by those elected under the amended constitution, before January 1, 1857. If it was contemplated that such officers should exist, and have authority to perform their appropriate functions, as we cannot doubt that it was, under what power were they to receive their commissions, in case of vacancy? Was it under the constitution as it was before the change, the executive retaining its former authority; or by virtue of the provision in the resolves, in s. 7, added to art. 6 of the constitution? By this section it is quite obvious that the vacancies therein mentioned are exclusively those which occur by death, resignation or otherwise, after the elections have taken place under the amended constitution. If, however, it were otherwise, it could not aid the plaintiff in a successful prosecution of this suit, for if a vacancy took place in the office of register of probate in the county of Kennebec, before the first day of

January, 1857, he was not appointed by the governor and council to supply it.

The amendments, as we have before seen, contain no express abrogation of any of the provisions in the constitution as it was previous to the amendments, excepting so far as the new mode of filling the offices referred to, supersedes, of necessity, those provisions. Hence the old mode of appointment cannot be regarded as repealed, any further than it stands in the way of a practical operation of the mode prescribed in the amendments, and adopted by the people as a part of the constitution. 3 Gray's R., 602.

Again, the tenure of those offices was not provided for upon the hypothesis that it was not designed by the legislature which passed the resolves, that upon their adoption the offices to be filled by election, should remain vacant till those chosen thereto should commence the performance of their duties; and that the former provisions of the constitution, touching the matter in question, were annulled. In such cases, by art. 9, s. 6, the tenure shall be during the pleasure of the governor and council. This view was anticipated by the counsel for the plaintiff in his argument; and it is insisted that this section has reference only to those offices which the executive have power to fill. This section is under the article entitled "general provisions," which treats of matters various in their character, such as commissions to be signed by the governor, the elections required to be made on the first Wednesday of January annually, and the removal of officers by impeachment, and by the governor and council, on the address of both branches of the legislature. The section in question, of itself, or in its connection with other sections in the same article, does not appear to be designed to be affected by the limitation contended for. It is true, that the tenure of elective offices are generally, if not universally, provided for in this state. But we are now examining the tenure of offices which had been filled by executive appointment, and which were to be filled afterwards by those chosen by the people, under the amendments which became parts of

the constitution, anterior to the time when these officers could act by virtue of their election. No reason is perceived for denying to the executive the authority to make the appointments during this interval, under the provision referred to.

Francis Davis was appointed by the governor, by and with the advice and consent of the council, register of probate of the county of Kennebec, on January 23, 1856; was qualified on February 1, 1856, and on the same day entered upon the discharge of the duties appertaining to that office. In this appointment the executive did not transcend the limits of the power conferred upon it by the constitution. Mr. Davis was by right the register of probate from the time he was qualified to act as such, and his acceptance of the trust, under his commission, operated as the removal of the plaintiff.

Other questions have been discussed in argument, the consideration of which becomes unnecessary, under the view which we have taken.

Plaintiff nonsuit, judgment for the defendant.

DAVIS, J. I concur in the result only. On grounds not discussed in the opinion, I conclude that the county commissioners were justified in ordering the register *de facto*, who performed the duties of the office, to be paid by the county treasurer. Whatever rights or remedies the plaintiff may have against other parties, I do not think this action can be maintained.

But I cannot agree with my associates in the reasons which they have given as the basis of this conclusion. And as important questions are involved, which may be raised again whenever new amendments to the constitution are proposed, I have concluded to state the reasons for my dissent.

There are two or three familiar principles, unquestioned, of which I think we need to be reminded.

All proper governmental power is inherent in the people.

Constitution, art. 1, s. 2. All officers, however elected or appointed, in administering the government, are the agents of the people. For the purpose of a government, the people have adopted a written constitution. This constitution may be amended from time to time, like any other statute law; but at any given time it consists of certain definite words and sentences. If it is amended, it is done by striking out certain words and sentences contained in it, or in adding words and sentences to it. And there is some definite point of time when the change is made.

When the constitution of this state was formed, the office of governor was established; and also the office of register of probate. *The office* is entirely distinct from *the person filling it*, though the same words describe each. The office exists, whether filled or vacant. And *the mode of filling it* is also an entirely distinct matter from the office, as established. Any change in the manner of filling an office, does not affect its existence, or the duties appertaining to it.

The people concluded to fill the office of governor themselves, by election, instead of delegating authority to any man, or to any body of men, to do it for them. But they did not, at first, think best to fill the office of register of probate in this way. They gave the governor and council a power of attorney to do it for them. Const., art. 5, part first, s. 8. But the person so appointed by the executive was the agent of the people,—responsible to them alone. His commission was from the governor, but in behalf of the people. And though the governor should die, or go out of office, if at the time of the appointment he was duly authorized to act for the people, the commission might be still in force. The plaintiff was appointed register of probate for the county of Kennebec, February 28th, 1854. In accordance with the law at that time, his commission was for four years. As the office was established by the constitution, and he was appointed to fill it *by the people*, acting through the executive, he had the right to hold the office until Feb-

ruary 28th, 1858, unless *the people*, primarily or by some duly authorized agent, removed him from it,—or, by amending the constitution, abolished the office.

In 1855 the people did amend the constitution relating merely to the *mode of filling* this office. And upon this amendment three questions arise. When did it take effect? How did it affect the power of the governor and council to remove registers of probate from office? How did it affect the rights of registers then in office?

1. When did this amendment take effect?

The constitution itself provides that amendments proposed by the legislature shall be submitted to the people, who shall vote thereon; "and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendments, it shall become a part of the constitution." The people voted on this amendment in September, 1855. The mode prescribed by the legislature by which the result should "appear," was, that the lists of the votes should be returned by the several towns to the secretary of state, and be counted by the governor and council. This count was made in November, 1855, and on the first Wednesday of January, 1856, "return thereof was made to the next legislature," as the resolves required.

I think that the amendment took effect when the governor and council "counted the lists" returned, and officially adjudicated upon the result. *Then* it constitutionally "*appeared* that a majority of the inhabitants voting on the question were in favor of the amendment." This duty and power of determining this question were committed to the governor and council in their official capacity, as the executive department of the government; and their decision was effectual and conclusive. So it has been held by this court. *Dennett, pet'r*, 32 Maine R., 508.

But whether the amendment took effect when the lists of votes were counted and adjudicated upon by the governor and council, or when they "made return thereof to the next legislature," is immaterial. Both had been done before the

governor and council in 1856 assumed the power to remove the plaintiff from office. And I do not understand the majority of the court as denying that upon the performance of one or the other of these acts, the amendment took effect. They say, "no opinion is expressed, notwithstanding reasons plausible, at least, may exist in favor of the affirmative of one or the other of the alternatives mentioned."

2. Did the amendment annul the power of the governor and council to appoint registers of probate?

The only appointing power for this office conferred by the constitution as it was before the amendment, was given by the eighth section of the fifth article. By this section the governor and council were empowered "to appoint" persons to fill certain offices, among which were "registers of probate." By the amendment these words—"registers of probate"—were "stricken out," and a section was added, providing for their election by the people.

A subsequent statute repugnant to former statutes operates as a repeal of them, without any express provision to that effect. *Commonwealth* v. *Kimball*, 21 Pick. R., 373. But in this case the people not only reassumed the power to fill the office of register of probate themselves, which they had previously delegated to the executive; they actually *revoked* the authority of the governor and council thenceforth to appoint, by "striking out" the only provision in the constitution by which that power had been conferred.

I understand, however, that the majority of the court hold that when the amendment was adopted, and the constitution actually amended, "by striking out the words, 'registers of probate,'" the words were not thereby stricken out, nor the provision repealed. They say, "the terms—'and by striking out the words'—in the resolves cannot be regarded as designed to repeal the existing provisions of the constitution, when the parts added would have no such effect."

I am unable to assent to this proposition. When the people vote to "strike out" a provision of the constitution, if that does not repeal it, I am at a loss to know in what way

any provision of the constitution can be repealed. It is precisely the same language generally used by legislatures in repealing portions of any statute; and these have always been held effective for that purpose, whether any provisions have been added or not. To hold otherwise is to hold that the people have no power to *repeal* any portion of the constitution; that they cannot strike out, but only add thereto. This will hardly be asserted by any one. But if the people have the power, by any language, to repeal any provision of the constitution, in what way could they have exercised it more palpably than by voting to amend it "by striking out" the provision empowering the governor and council "*to appoint registers of probate?*" To my mind the conclusion is irresistible, that the moment the amendment was adopted, the power of the governor and council to fill that office by appointment, except in the contingencies provided for by the amendment, ceased.

3. What effect did the amendment have upon the rights of registers of probate then in office?

The amendment did not in any way affect the office, except to limit the tenure of it, when filled by election, to two years. The great purpose of the amendment was to change *the mode of filling the office.* Those who were then in office were not to be affected by it, until others should be chosen by the people to succeed them. Until then, unless their commissions expired earlier, they were legally in office. If their commissions had expired earlier, then the office would have been vacant; and it would clearly have been a "vacancy," (not *created* by a removal, no power for which was conferred by the amendment,) but a "vacancy *occurring* by death, resignation, or *otherwise*," which the governor and council were empowered by the amendment to fill. But unless their commissions expired before January 1st, 1857, the registers then in office had the right to hold the offices until that time. The people by the amendments had said, "we revoke, from this day, the power of the governor and council to fill these offices; we ourselves will choose persons to go

into them the first day of January, 1857." How could they have said any more distinctly to those in office, "you are to remain there until that time?"

It is asked, however, "if the former authority of the governor and council was struck down by the amendments, on what principle can the tenure of office longer survive irrevocable, when that tenure was by constitutional provisions which have been annulled?" And it is said that if the amendment divested the governor and council of the power to appoint registers of probate, then "the rights of those officers under their commissions were swept away by the amendments at one and the same time."

The fallacy of this proposition is in the assumption that registers of probate were not the agents of the people,— but merely the agents of the governor and council. If this were so, then, indeed, the removal of the governor, or a revocation of his appointing power, would have "swept away" the official rights of all persons appointed by him. But if registers of probate were the agents of *the people*, then the revocation of the authority before that time given to the governor and council to appoint, did not affect *them*. As well might it be contended that the removal of a superintendent of a railroad corporation, or a revocation of his authority to employ servants for the company, would "at one and the same time sweep away" the rights of all the employees. It certainly requires no argument to demonstrate that the revocation of that part of a power of attorney by which an agent had been authorized to appoint other agents for the principal, would not revoke the authority of any agents previously appointed by him. Their agency would continue until revoked by the principal himself. So the agency of registers of probate continued until the people, who took the appointing power away from the governor and council that they might exercise it themselves, did actually exercise it by choosing other agents in their places.

It is insisted, however, that the power of removal was still retained by the governor and council under the sixth section

of the ninth article of the constitution:—"the tenure of all offices which are not, or shall not be otherwise provided for, shall be during the pleasure of the governor and council."

It is a sufficient answer to this, to say, that if the governor and council had the power to remove under this provision, they have the same power still—which no one pretends. This provision is still in the constitution; and if they have not *now* the power to remove registers of probate, it is only because the tenure of that office was "otherwise provided for" by the amendment. If being "otherwise provided for" took away the power of removal, as in my opinion it clearly did, then it was taken away when the amendment took effect.

It should be noticed, too, that it is the *tenure of the office* to which it refers; and not the right of any particular incumbent. That the amendment did "provide for" the tenure of this "office," is beyond all question. It follows conclusively that it was no longer embraced in the provision referred to.

I have thus given the reasons why I cannot concur in the doctrines expressed in the opinion of my associates, as much as I regret to differ from them. And there is one other principle, not very distinctly expressed, but apparently pervading their opinion, from which I must dissent. I refer to the idea that, though the amendments took effect when it appeared that they had been adopted by the people, they did not really constitute a part of the constitution until the officers specified had been chosen by the people, and had entered upon the discharge of their duties; that during the year that intervened, neither the old provisions, nor the new, were absolutely a part of the constitution; and yet that both were, in some sense, parts of it; that the amendment to the constitution was a gradual process, covering the whole of the year 1856, during which the amended provisions were a kind of constitutional chrysalis,—neither a butterfly, nor a caterpillar,—and yet both the one and the other, as exigencies might require. I am not certain but that this view found some favor in the Massachusetts opinion, which is cited. But I have been accustomed to regard the constitution as com-

posed, at all times, and at every given period of time, of certain definite, ascertainable words and sentences, actually in force,—and so composing the whole of it that no other provisions could, in any sense, be in force as a part of it. I am therefore of opinion that when the amendments took effect, whatever provisions were added were thenceforth actually a part of the constitution; and that whatever was repealed was instantly and absolutely void. There was certainly no provision that the force of the one should be continued, or that of the other be stayed. And as the only provision whereby the people had conferred upon the governor and council the power "to appoint registers of probate" was by the amendment "stricken out," I believe that the appointment of Francis Davis to that office January 23d, 1856, was unconstitutional and void.

RUFUS BERRY, *Complainant, versus* GEORGE BILLINGS *et als.*

The word *premises* in a deed of conveyance means everything which precedes the *habendum*, and if the *premises* are descriptive merely, and no particular estate be mentioned, the *habendum* becomes efficient to declare the intention.

A deed of land "to have and to hold" to B. and his heirs, is good, although the grantee is not named in the *premises;* and when the *habendum* is not repugnant to the *premises* it is good and effectual.

REPORTED by RICE, J.

This is a COMPLAINT FOR FLOWAGE. The respondents plead the right to flow.

To maintain the issue on his part the plaintiff put in the following deeds: Joseph Hazeltine and als., to himself, dated April 25th, 1815; Nathaniel Fellows, to same, 20th February, 1818; Charles T. Hazeltine and als., to same, 24th April, 1819; Moses Fellows, to same, 13th April, 1822; A. Dexter, to same, 27th April, 1836.

David Garland, the surveyor, testified that he run the lines and measured the land described in the deeds, and delineated the same upon the plan.

The plaintiff also introduced evidence tending to show that his lands were overflowed and damaged by the respondents' mill-dam, and to what extent.

The respondents, in defence, set up the right to flow the complainant's land above described.

To prove this, they put in a deed from the complainant to John Chandler, dated September 29th, A. D. 1821, and from him, through several mesne conveyances, to the defendants.

They then introduced evidence tending to show that they had flowed the complainant's land only so far as they were authorized to do by the aforesaid deeds.

At this point the case was withdrawn from the jury in order to obtain a judicial construction of the deeds aforesaid, and settle the legal rights of the parties under them, and whether they have the right to flow the lands of the complainant, or any portion thereof, and what portion, and to what extent.

J. M. Meserve, counsel for the complainant.

The complainant's title to land described, and fact of flowing, are not controverted.

The respondents set up the right to flow:

1. That the right was conveyed to John Chandler by the complainant.

2. That John Chandler conveyed that right to I. Dexter and als., and that they derive it from them through sundry mesne conveyances.

3. That Chandler, having that right as appurtenant to his mill, conveyed the mill to Isaac Dexter and als., "with all the privileges and appurtenances," and that this right passed with the mill as incident and belonging to it.

The complainant contends that the right to flow was only for the life of Chandler. That it was not an inheritable estate—that it extended only to a portion of the premises—

and that it was not conveyed to the respondents in the deeds relied upon.

1. The right conveyed to Chandler by the complainant, by his deed of 29th of September, 1821, was limited to the land then owned by complainant, namely: that described in the deed from Hazeltine and als., in 1815—being eighty acres less the widow's dower, which was thirty acres.

II. The right to flow, supposed to have been acquired by that deed, does not apply to a large portion of the flowed lands:

1. Because the Chandler deed has specific reference to the eighty acres embraced in Hazeltine's deed.

2. Because a portion of the lands were purchased by the complainant long after the deed to Chandler:

1. In 1822, of Moses Fellows; and

2. In 1836, of A. Dexter.

3. Because, by no legal construction, can the Chandler deed be made to apply to land afterwards purchased by the complainant, as it contains no covenants for title—none of seizin—none of right to convey—none against incumbrances—none for quiet enjoyment—none for warranty. 9 Mass. R., 514; Rawle on Covenants for Title, 341; 29 Maine R., 183; 33 Maine R., 483; 14 Johnson R., 193.

III. The respondents have not the right to flow, which was deeded to Chandler by the complainant in 1821.

(I.) That right was not an inheritable, or assignable, right. Coke's Littleton, s. 524; Rawle on Cov., 382.

1. There are no words in the *premises* of the deed to pass an estate to him or assigns. 4 Kent's Com., 519; Shepherd's Touch., 88; *Corbin* v. *Healy*, 20 Pick. R., 514; *Sumner* v. *Williams*, 8 Mass. R., 162. The words "heirs and assigns," in the *habendum*, do not enlarge the estate declared in the *premises*. Coke on Littleton, 384; Rawle on Covenants for Title, 468; 19 Vermont R., 272; 20 Pick. R., 516; 13 N. H. R., 517.

2. If the right was assignable, it has never been transferred or assigned to the respondents:

1. There is no deed of this right from Chandler to any party, executed, acknowledged or recorded.

2. In the writing of 10th of November, 1837, on the back of Chandler's deed, Chandler does not *assume* or *assert* the right to convey.

The same remark is true in regard to the writing of 24th of September, 1838, on same deed, signed by Freeman Dexter and als., to Stockin and als.

All attemps at conveying this right to flow, end with the last named writing. There is no conveyance of this right, *eo nomine*, or by specific provision, from Stockin and als.

IV. The respondents do not acquire this right to flow under the general words, "all the privileges and appurtenances thereto belonging." 17 Mass. R., 443; 10 Maine R., 224.

1. By no possibility could the right, under those general words, extend to any lands not acquired by complainant at the time Chandler deeded to Dexter.

2. Chandler's deed to Dexter and als., of April, 1832, does not convey the right in terms, and the estate granted, as described, is not of such a character as that the right passes as an incident.

The description is a "*piece or parcel of land*," with the privileges and appurtenances.

The attempt to convey this right in 1837, negatives a question of intent to pass the right under the general words, "privileges and appurtenances."

3. If the right passed from Chandler to Dexter and als., by deed of 1832, the respondents do not connect themselves with the covenant by "the said mesne conveyances" relied upon.

There are no words or terms used in the deed from Nathaniel Dexter to Stockin and als., in 1837, which pass the right to flow as appurtenant to the thing conveyed.

R. H. Vose, counsel for the respondents.

This is a complaint for flowage upon lot No. 152, in Win-

throp. Two points are presented for the consideration of the court.

First. What right to flow—to what extent—did the complainant, Berry, convey by his deed of September 29, A. D. 1821, to John Chandler? In other words, what is the true construction of that deed?

Second. Have the respondents succeeded to all the rights of said Chandler?

Under the first proposition, we maintain that the complainant himself granted to John Chandler, his heirs and assigns forever, the absolute right to flow eighty acres of land upon lot No. 152, (which it is admitted would include all the land flowed.)

Under the second proposition, we maintain that the respondents have succeeded, by several mesne conveyances, to all the rights of Chandler.

The deed of the complainant to Chandler is in these words: "full right and lawful authority to flow all the land on eighty acres of land, on lot numbered one hundred and fifty-two, in Winthrop aforesaid," then follows, "being all of eighty acres off of the full width of the east end of said lot, excepting thirty acres set off to the widow Elizabeth Hazeltine, as her thirds in the estate of Joseph Hazeltine." Whether the subsequent clause was intended to limit the first general description, "full right and lawful authority to flow all the land on eighty acres of land, on lot numbered one hundred and fifty-two, in Winthrop aforesaid," it is not now necessary to determine. Suppose it was, (which we deny,) still in the construction of this deed, we contend, the first general description must govern.

In *Worthington* v. *Kyler*, 4 Mass. R., 196, the words of description were, "all that my farm of land in said Washington, on which I now dwell, being lot No. 17, in the first division of lands there, &c." The farm demanded in the action was not included in lot No. 17, yet the court held that the whole farm passed, rejecting such reference as inconsistent and repugnant.

In *Keith* v. *Reynolds*, 3 Greenl. R., 393, the description was "a certain tract of land or farm, in Winslow," included in the tract which was granted to Ezra Potter. Afterwards there was a particular description by courses and distances, which did not include the whole farm. It was decided that the first general description must govern, and that the whole farm passed.

In *Lodge* v. *Lee*, 6 Cranch R., 237, the description was, "all that tract or upper island of land called Eden," and then was added a particular description, by courses and distances, which did not include the whole island. The court held that the whole island passed.

In *Jackson* v. *Barringer*, 15 Johns. R., 471, the grant was the farm on which I. I. D. now lives; the description then goes on to bound it on three sides, and adds, "and to contain eighty acres." The farm contained 149 acres, and the decision was, that the whole farm passed.

In *Swift* v. *Eyres*, Cro. Car., 546, the land conveyed was described as all the grantor's glebe lands lying in a certain town, viz.: seventy-eight acres of land, with all the profits, tithes, &c., and then was added, "all which was lately in the occupation of Margaret Peto." It was found that the tithes were never in the occupation of Margaret Peto, yet it was held that all the lands and the tithes first described passed.

In *Elliott* v. *Thatcher*, 2 Met. R., 44, note, the description was, all my real property, or homestead, so called, lying or being in Dartmouth, together with about thirty acres of land, more or less; for more particular description reference may be had to a deed given by Clark Richetson to David Thatcher, of the above mentioned premises. It appeared that the grantor was only seized of a part of the land which he bought of Richetson, yet the court decided that the whole passed.

In the case of *Crowley* v. *Bradbury*, 20 Maine R., 61, a conveyance of a certain saw-mill, machinery, &c., "meaning to convey all the premises which the grantor purchased of C. D., by deed dated, with all the privileges and subject to

all the restrictions therein expressed, reference thereto being had for a more particular description of the premises," will pass the mill and the whole land under the same, notwithstanding the grantor acquired by the deed to which reference was had, but a *part* of the premises upon which the mill was erected. In the case of *Melvin* v. *Proprietory of the Locks and Canals on Merrimac River*, 5 Met. R., 30, this same doctrine is fully established. These cases are cited by the court; also two cases from the New Hampshire Reports and one from East's Reports, in which a contrary doctrine was held, and yet the court came to the conclusion, to use their own language, that "the weight of authority, however, is, we think, clearly in favor of the *former* decisions."

In the case of *Wain* v. *Cabot*, 18 Pick. R., 553, a grantor conveyed all his farm in S., bounded, &c., also six acres of woodland, described by bounds, "being the same farm whereof M. died seized, and which the heirs of M. conveyed to me by two deeds recorded, &c.," it was held that the woodland passed to the grantee, although it was never owned by M., nor conveyed by his heirs to such grantee. See also *Drinkwater* v. *Sawyer*, 7 Greenl. R., 366, where the same principle is settled; also the case of *Dana* v. *Middlesex Bank*, 10 Met. R., 250, where the description was by metes and bounds extending to a certain street, which was intended to be limited by the words, *being the same that was set off to W.*—the land set off to W. did not extend to the street—held that the first description must prevail.

In the case now before the court, the language of the deed is: "*full* right and *lawful* authority to flow *all* the land on eighty acres of land, on lot numbered one hundred and fifty-two, in Winthrop aforesaid." Is not this description sufficiently clear and certain? Upon the principle of the cases already cited, is not the full right and lawful authority to flow all the land on eighty acres of land on lot No. 152, clearly conveyed by the complainant, Berry, to John Chandler, by his deed of September 29, A. D. 1821.

HATHAWAY, J. The respondents allege that they have the right to maintain their dam, and flow the complainant's land, without compensation for damages. They derive their title, by mesne conveyances, from John Chandler, through Isaac Dexter and others, to whom Chandler conveyed, by deed of April 23, A. D. 1832.

While Chandler owned the mills, and the complainant owned a part of lot No. 152, Chandler maintained a mill-dam where the respondents now maintain one, and overflowed the complainant's land, and settled with him September 29th, 1821, and paid him "full satisfaction for all past flowage on said land, by said John Chandler's mill-dam," as expressed in the complainant's deed of that date, by which he sold "and conveyed to the said John Chandler full right and lawful authority to flow all the land on eighty acres of land, on lot numbered one hundred and fifty-two, in Winthrop aforesaid, being all of eighty acres, off of the east end of said lot, excepting thirty acres set off to the widow Elizabeth Hazeltine, as her thirds in the estate of Joseph Hazeltine. To have and to hold the same, with full right to flow, to him, the said John Chandler, his heirs and assigns, forever, *provided* that he, the said Chandler, shall not flow higher than his present mill-dam will now flow." By this deed Chandler acquired a right to flow the complainant's land.

The complainant insists, in argument, that as there were no words of inheritance in the *premises* of his deed to Chandler, the words, "heirs and assigns," in the *habendum*, are void and of no effect, and that Chandler took only the right to flow during his life. The technical meaning of the word *premises*, in a deed of conveyance, is everything which precedes the *habendum*. The office of the *habendum* is to name the grantee, and to limit the certainty of the estate. If the premises in a deed are merely descriptive, and no particular estate be mentioned, then the *habendum* becomes efficient to declare the intention.

By legal construction, a deed of land *to have and to hold*, to B. and his heirs, is good, although the grantee is not

named in the premises. Inst., 6 and 7, 298, 299; Hargrave's note, 33; *Sumner* v. *Williams*, 8 Mass. R., 174; 4 Kent's Com., 468.

In the complainant's deed to Chandler the *habendum* is not repugnant to the premises, and it is therefore good and effectual. Vin. Abr., tit. Grant K., s. 1. Hence, when Chandler conveyed his mills, &c., to Isaac Dexter and others, by his deed of April 23, 1832, he owned the right to flow the complainant's land, by virtue of his deed to him, and to his heirs and assigns forever, subject only to the *proviso* in the deed concerning the height of the flowing, and that right passed by Chandler's deed to Dexter and others, as appurtenant to the mills, and thence, by mesne conveyances, to the respondents. The case is not different, in principle, from that of the owner of a mill and dam, and certain lands overflowed by the dam, who sells the mill with all its privileges and appurtenances. In which case the purchaser may continue the dam, with the same head of water, without payment of damages to the owner of the land flowed. 4 Kent's Com., 467; *Hathorn* v. *Stinson*, 1 Fairf. R., 224. Nor does it make any difference that the deed from Nathaniel Dexter does not contain the words privileges and appurtenances; those words were not necessary. 2 Greenl. Cruise, 334, note; *Kent* v. *Waite*, 10 Pick. R., 141; *Blake* v. *Clark*, 6 Greenl., R. 436; *Brown* v. *Thissell*, 6 Cush. R., 257, cited by counsel in argument.

On the 29th of September, 1821, when the complainant conveyed to Chandler the right to flow his land, he owned no part of the lot No. 152, except the eighty acres which had been conveyed to him April 25, 1815, by Joseph Hazeltine and others, by this description, to wit.: "Beginning at the north-east corner of lot numbered 152, thence a west north-west course between said lots No. 152 and lot No. 153, one half mile and ten rods, thence southerly seventy-six rods, thence keeping the said width of seventy-six rods back to the east end of said lot, thence northerly to the first mentioned bounds, it being eighty acres more or less. That

part of the said premises which is set off as the widow's dower is hereby reserved in this deed."

The complainant did not acquire title to the residue of lot No. 152, until by deed from Amasa Dexter, of April 27, 1836; the eighty acres conveyed to him by Hazeltine and others were conveyed by metes and boundaries; and their location is certain and unquestioned. His deed to Chandler conveyed the right to flow all of eighty acres off of the full width of the *east end* of said lot, excepting thirty acres set off to the widow Elizabeth Hazeltine as her thirds.

The ambiguity, if there be any, in the description of the land in the complainant's deed to Chandler, arises from the improper use therein of the words, "*east end of said lot.*" There is no east end of the lot. The course of the line which is marked on the plan as its *east line*, is south, south-west, and that of the line marked as the north line is west, north-west. There is no reasonable doubt that the description in the deed from Hazeltine and others, to the complainant, and in that from him to Chandler, were of the same lot. In both deeds the description is of eighty acres, excepting the widow's dower—a part of lot No. 152, three of the exterior boundary lines of which are also boundary lines of the lot described, and the complainant had a deed covering eighty acres, and no more, and his deed was recorded.

We do not consider the question, whether or not Berry's deed to Chandler would estop him from claiming damages for flowing that part of lot No. 152 to which he has subsequently acquired title, because we are satisfied that he did not convey, or attempt to convey, any interest in the land which he did not then own.

The respondents have the right to flow the eighty acres of land, more or less, except the widow's dower, which was conveyed to the complainant by Joseph Hazelton and others, by deed of April 25, 1815, subject to the proviso in the deed of Berry to Chandler, concerning the height of the dam and flowing; and they have no right to flow any other part of said lot No. 152, except according to the statutory proceed-

ings, and as agreed by the parties, the respondents must be defaulted, and commissioners appointed to assess the damages.

MAY, J., having been counsel in this case, did not sit at the hearing.

COUNTY OF LINCOLN.

DAVID LAWRENCE *versus* SAMUEL FORD.

Quarter costs only can be taxed for the plaintiff, when it appears on the rendition of judgment that the action should have been originally brought before a justice of the peace.

Whether an action should have been brought before a justice of the peace, is to be determined ordinarily by the amount of the judgment.

Where the defendant filed an account in set-off, and thereafter offered to be defaulted for a sum less than twenty dollars, the plaintiff, in order to recover full costs, should have it appear that his acceptance of the offer was by reason of a reduction of his judgment, in consequence of the account filed in set-off.

EXCEPTIONS were taken to the ruling of HATHAWAY, J., in this case, which is ASSUMPSIT on an account annexed in a bill of particulars to the writ, for $36.80. On the first day of the term, the defendant filed his account in set-off, amounting to $24.92, a bill of particulars of which was ordered and filed in vacation. On the third day of the term the defendant offered to be defaulted for $19, debt and legal costs, which was by the plaintiff accepted, and the defendant defaulted.

The judge decided and ruled as matter of law, that judgment being for less than $20, the plaintiff was entitled to only one fourth of the damages as costs.

To which ruling and decision the plaintiff excepted.

W. Hubbard, counsel for the plaintiff, excepting, submits:

1st. The action was properly brought into this court;

2d. The defendant, having filed his account in set off, and not having withdrawn it, when he made his offer of default, is presumed to have made his offer for the balance due from him;

3d. Therefore it is equivalent to a finding by jury, and their certificates requisite to the plaintiff's recovery of full costs.

H. Ingalls, counsel for the defendant.

This is an action upon an account annexed, and the defendant filed an account in offset. At the second term the defendant offered to be defaulted for $19, and legal costs, which offer was accepted by the plaintiff, and the defendant defaulted for that sum as damages. The court allowed one quarter part of that sum as costs. The plaintiff claimed full costs, and excepted to the ruling of the presiding judge as to costs.

1. By the R. S., ch. 151, s. 13, it is provided, that "if, in any action originally brought before the Supreme Judicial Court or any District Court, it shall appear, *on the rendition of judgment*, that the action should have been originally brought before a justice of the peace or the judge of any municipal or police court, the plaintiff shall not be entitled to recover for costs more than one quarter of the amount of debt so recovered."

By this statute it must appear, "*on the rendition of judgment*," when the action should have been commenced. In this case the only evidence upon this matter before the court, was the amount of damages recovered by the plaintiff. It did not appear whether anything was due upon the account in offset or not, or that there was more than the sum of $19 due upon the plaintiff's account. The defendant offers $19, and the plaintiff accepts it. That is the whole case. Nothing further appears "*on the rendition of judgment.*" Account in offset filed is not proof of it.

2. The only exception in actions of assumpsit as to costs, in case the damages are less than $20, is in ch. 115, s. 99. Full costs can be allowed in such cases only where "the *jury shall certify in their verdict that the damages* were reduced as low as that sum by means of the amount allowed by them on account of said set-off, and as due upon it." In

this case there was no such certificate by the jury or any such adjudication by the court, even if that would avail.

3. The earlier decisions in Massachusetts and this state, in relation to costs in such cases, are inapplicable to this case, as the two sections of the Revised Statutes, above referred to, establish an entirely different rule as to costs in such cases. Statute of 1821, ch. 59, s. 20. *Thompson* v. *Tompson*, 31 Maine R., 120, is a decision under the Revised Statutes, and is a case in point.

4. Justices of the peace have jurisdiction of all actions, (with certain exceptions, of which this is not one,) in which the damages do not exceed $20. The amount due the plaintiff in this case was $19. The action should, therefore, have been commenced before a justice of the peace. R. S., ch. 116, s. 1.

MAY, J. By the R. S., ch. 151, s. 13, quarter costs only can be taxed for the plaintiff, when it appears on the rendition of judgment, that the action should have been originally brought before a justice of the peace. Whether an action ought to have been so brought, is ordinarily to be determined by the amount of the judgment. If, as in this case, that amount does not exceed twenty dollars, the plaintiff's costs can be only one quarter part as much as his debt or damage, unless a different rule of taxation is authorized by some other statute.

It is contended that the provisions of the R. S., ch. 115, s. 99, apply to this suit. That section provides, that "in actions on contract, in which an account is filed in set-off, although the damages found for the plaintiff shall not exceed twenty dollars, he shall be entitled to full costs, provided the jury shall certify in their verdict that the damages were reduced as low as that sum, by means of the amount allowed by them on account of said set-off, and as due upon it. We do not think that the facts in this case bring it within the provisions of this statute. There is nothing which satisfactorily shows that the judgment was reduced below twenty

dollars, by means of anything due to the defendant upon the account in set-off. We do not mean, however, to decide that the reason of such reduction must in all cases appear from the certificate of the jury. It may be shown by the agreement of the parties, or by the adjudication of the court, when the court, instead of the jury, by the express or implied consent of the parties, are called upon to assess the damages. The fact must appear in some way; otherwise quarter costs only can be allowed.

From the exceptions in this case, it appears that the defendant filed his account in set-off; and offered to be defaulted for a sum less than twenty dollars; but it does not appear, either from the offer, or its acceptance, or in any other way, that the account in set-off was the reason why no more was offered, or why the offer was accepted. In cases such as this, the plaintiff, if he wishes to recover full costs, should be careful to have it appear upon the docket, that his acceptance of the offer was upon the ground or condition that his judgment should be regarded as being reduced to the amount accepted, by reason of the amount due to the defendant upon his account filed in set-off. This not having been done, the exceptions must be overruled.

Exceptions overruled.

DAVIS, J., *dissenting.* The suit of the plaintiff is upon an account annexed, amounting to $36.80. The defendant seasonably filed an account in set-off, and then offered to be defaulted for nineteen dollars. Upon these facts the presiding judge "decided and ruled, *as a matter of law, that the judgment being for less than twenty dollars,* the plaintiff was entitled to only one fourth of the damages as costs."

It is not the *rule of law* that the plaintiff is to be restricted to quarter costs whenever his judgment is for less than twenty dollars. The statute prescribes a different rule:— "if it *shall appear* on the rendition of judgment that the action should have been originally brought before a justice of the peace." R. S., ch. 151, s. 13. The amount of the judg-

ment sometimes, but by no means invariably, determines the question. It not unfrequently is the case that the plaintiff is entitled to full costs, when his judgment is for less than twenty dollars. *Williams* v. *Veazie*, 8 Greenl. R., 106; ib. 138. Whenever the plaintiff, in any contingency, has a claim at the time his suit is commenced for a larger sum than is within the jurisdiction of a justice of the peace, he is entitled to full costs, though his judgment is for less than twenty dollars. *Chesley* v. *Brown*, 11 Maine R., 143. The decision in regard to costs must always turn—not upon the amount of the judgment—but upon the question whether, in any contingency, it was necessary for the plaintiff to bring his suit in this court. And this question must, in every case, be determined by the court as a matter of fact, and not of law.

And unless the facts show beyond any doubt that there could have been no such necessity, the plaintiff is entitled to full costs. For the general provision of law gives full costs to the prevailing party. R. S., ch. 115, s. 56. This applies to all cases not clearly excepted from it. *Ellis* v. *Whittier*, 37 Maine R., 548. It is not for the plaintiff, therefore, to show that *he is entitled* to full costs. He is so entitled, unless the facts make it "appear" affirmatively that he is not. The burden of proof is not upon him. If the facts leave it uncertain, or doubtful, the doubt is in his favor.

I cannot perceive how the facts in this case can authorize the conclusion that the action should have been brought before a justice of the peace. The plaintiff declares that there is due upon his account $36.80. The defendant does not deny it, but declares that he has an account against the plaintiff, on which is due $24.92, and he files it in set-off. There is no *proof* that anything was due upon either. The offer to be defaulted, and the acceptance of the offer, cannot reasonably be supposed to refer to any consideration but the balance of one account over the other. What right, then, has the court, without any proof, to *assume* that there

was only the sum of nineteen dollars due on the plaintiff's account; or that there was nothing due on the defendant's account,—when he declares that it was all due, and when it is conclusively barred by the judgment? *Smith* v. *Berry*, 37 Maine R., 298. And yet both of these propositions must be assumed, or proved, before it can "*appear* that the action should have been brought before a justice of the peace."

In the case of *Hathorn* v. *Cate*, 5 Greenl. R., 74, the defendant filed an account in set-off, and then offered to be defaulted for $15.50. The plaintiff accepted the offer, and the court held that he was entitled to full costs. I am aware that *since that time* another provision of statute has been made, that "although the damages found for the plaintiff shall not exceed twenty dollars, he shall be entitled to full costs; provided *the jury* shall certify, *in their verdict*, that the damages were reduced by means of the account in set-off." R. S., ch. 115, s. 99. But this provision manifestly applies to those cases only *in which there is a verdict.* All other cases are left as before, to be determined by the question whether the suit should have been brought before a justice of the peace.

It is suggested that the plaintiff, if he would have avoided being restricted in his costs, should have been "careful to have it appear upon the docket, that his acceptance of the offer was upon the ground or condition that his judgment should be regarded as being reduced to the amount accepted, by reason of the amount due upon the account filed in set-off."

It need not be said that such an entry would not be the certificate of a jury, "in their verdict." Nor would such an entry, if made, afford any evidence beyond what is already before the court, of the fact stated. Such an entry would not bring the case within the provision of statute referred to. It was not for the plaintiff, therefore, to be careful to make it appear that his action should *not* have been brought before a justice of the peace. It was enough for him that it

did not appear that his action *should* have been so brought. I am, therefore, of opinion that he is entitled to full costs, and that the exceptions should be sustained.

ALFRED A. CHILDS ET AL. *versus* SAMUEL D. WYMAN.

Where one not the payee of a negotiable note signed his name on the back, without date, the presumption of law arises that he so wrote it at the date of the note, or agreed to do so, and did subsequently, in pursuance of such agreement.

The words "*without recourse*" written under the signature of one not the payee, upon the back of a note, can have no legal effect, and are mere surplusage.

If one not otherwise a party to a note write his name upon the back of the same the day after its date and execution by other parties, but in pursuance of an agreement to do so at the time it was made, he is liable as an original promisor.

EXCEPTIONS were taken to the rulings of MAY, J.

This action is ASSUMPSIT on account annexed for $200.00, and also on note for $600.00, dated March 15, 1855, signed by Richards & Barker, payable to A. A. Child in ninety days, with the defendant's name on the back of the note, to whose name was added the words "without recourse."

The defendant is declared against as maker of the note. A. A. Child afterwards indorses to his firm, the plaintiffs.

The judge instructed the jury that if the defendant put his name on the note when it was given to Child in payment of the plaintiffs' account, they would be entitled to recover of the defendant, notwithstanding he added the words to his signature, "without recourse," as appears upon the note. The addition of these words under such circumstances, would not limit or discharge the defendant from the liability which his signature upon the note would otherwise impose; that if the defendant did not put his name upon the note on

the evening it was delivered to the plaintiff, Childs, in payment of the plaintiffs' account, still, if the plaintiff, Childs, received it under an unfounded apprehension or belief created by the language and conduct of the defendant that the defendant was to sign or indorse it so as to be liable for it, and under such misapprehension the plaintiff, Childs, receipted the account the plaintiffs had against the defendant, and permitted him to take it, and if after having done so, and discovering that the defendant had not so signed or indorsed it, the plaintiff, Childs, thereupon asked him to do so, and he declined, and then on the next morning or next but one, he called upon the defendant and urged him to sign it or indorse it as an act of justice, and the defendant did then indorse or put his name upon the back of it, as it now appears, and the plaintiff, Childs, accepted it as a binding signature upon the note, such signing and delivery of the note will make the defendant liable as an original promisor, in the same manner as if he had put his name upon the note at the time of its delivery, the evening before, notwithstanding he added to his signature the words "without recourse," and before signing it had stated to the plaintiff, Childs, that he would not indorse it to be holden.

He further instructed the jury that if they should be satisfied that the defendant, at the time, or immediately before he gave the note to the plaintiff, Childs, falsely and fraudulently affirmed to him that the makers, Richards & Barker, were good, or perfectly good, as an inducement to the plaintiff, Childs, to take it, and if such affirmation was not true, and the defendant knew it to be so, or had reasonable grounds to believe that said Richards & Barker had failed, and were insolvent when he so stated, such false affirmation would authorize the plaintiffs, for whom the plaintiff, Childs, was acting, to treat the note as a nullity, and to recover for their original account for which the note was taken upon the count inserted in the writ for that purpose, but the plaintiffs are not bound so to treat the note, and if the jury find it was signed upon the back by the defendant so as to be an origi-

nal promisor in the manner before stated, the plaintiffs may, notwithstanding such fraud practiced upon them, recover upon the note.

That if the jury should find that it was agreed between the plaintiff, Childs, and the defendant, that the plaintiffs should take the note of Richards & Barker, payable to them in payment for their account, without any liability on the part of the defendant, and such contract was fairly and honestly made, without any false representations having been made by the defendant, as to the ability of Richards & Barker to pay; and the plaintiffs, by Mr. Childs, did so take it in payment of their account, and the defendant, subsequently, and not as a part of the settlement of the plaintiff's claim, put his name upon the note, then the plaintiffs could not recover on the note without showing some consideration for such indorsement.

The jury returned a verdict for the plaintiffs, finding a special verdict against the defendant, as an original promisor upon the note declared on.

H. Ingalls, counsel for the plaintiff.

This case is presented on exceptions by the defendant.

The action is upon an account annexed, and a promissory note.

No question is made as to the account.

The note is signed on the back of it by the defendant, and at the time of signing, he added to his signature the words, "without recourse."

1. It has been repeatedly held in Massachusetts and this state, that if a person puts his name on the back of a note, he not being the payee, before it is issued, he is to be regarded as an *original promisor*, in the same manner as if he had signed the note upon its face.

2. In this case, what is the effect of the words, "without recourse?"

If a person, not the payee of a note, signs his name upon the back of it, and over his signature writes the words,

"waiving demand and notice," his liability is not changed from that of a *promisor* to that of an *indorser*. *Lowell* v. *Gage*, 38 Maine R., 35.

The words, "waiving demand and notice," have reference to an *indorsement*, and so also do the words "without recourse." If the former words do not change the character of the signature, by the same reasoning the latter words should not. I am not now inquiring as to the effect of the words upon the liability of the party signing, provided he is an *indorser*, for it would be very different, but in determining whether the party signing is a *promisor* or an *indorser*, the words "without recourse," should have no greater force than the words "waiving demand and notice." So far as the latter question is concerned, they are words of the same meaning and effect.

The defendant is, therefore, an original promisor. His liability is the same as if he had signed his name under that of Richards & Barker, and added to his signature the words "without recourse." If he had so signed this note, is there any pretence that he would not be holden? He must be presumed to have put his name to the note for some purpose. Accordingly, where a note was written, "Borrowed of J. S., £50, which I promise *not* to pay," it has been held to be a good promissory note. Story on Promissory Notes, s. 12; Chitty on Bills, p. 38.

3. Besides, in this case the writing the words "without recourse," to his signature, was a fraud on the part of the defendant. The plaintiff, Childs, saw the defendant writing upon the note, and supposed he was putting his signature there, as he, Childs, had requested. The stage was in waiting for Childs, and he took the note without reading or comprehending the words upon it.

4. It is contended by the defendant that his name was not put upon the note till after it had been delivered to the plaintiff, Childs, and therefore that the note is without consideration as to him.

The note was received in part payment of an account of

the plaintiff's against the defendant. The signing by the defendant was a part of that settlement. The case abundantly shows that it was the expectation of Childs that the note should be signed by the defendant, and that it was not the intention of Childs to release the defendant from liability, and take the note of men of whom he had no knowledge. He wanted additional security. The fact that it was not signed on the evening of the settlement, was the result of a mistake and misapprehension on the part of the plaintiff, Childs. The signing by the defendant was simply a correction of that mistake, and forms a part of the original transaction. This is a much stronger case for the plaintiffs than *Moies* v. *Bird*, 11 Mass. R., 436, where the plaintiff prevailed. That is a case directly in point, and fully sustains the instructions given in this case.

5. The instructions might have been much more favorable for the plaintiff. There were false and fraudulent representations made by the defendant, as to the responsibility of Richards & Barker. Suppose Childs had taken the note under such representations, with no agreement or expectation that the defendant should sign the note. Such a transaction would be a nullity. The account would, if the plaintiff saw fit so to treat it, be still unpaid. If, under such circumstances, the defendant signed the note days or even weeks after it was delivered, there should be a good consideration, for it would be in settlement of an account still in force, by reason of fraudulent practices on the part of the defendant. In this case, even if the signing by the defendant was a separate transaction, there was a good consideration.

6. The note was payable to Childs or order, and the name of the defendant was put on the note before it was indorsed by Childs to his firm, and before it was accepted by the firm.

7. But the closing portion of the charge to the jury is all the defendant could ask, and leaves the defendant no ground whatever of complaint. All that went before is qualified and restricted by this portion, in such manner as to give the defendant the benefit of all he had proved, provided the jury

gave credit to him and his witnesses, which it appears the jury did not do.

W. Hubbard, counsel for the defendant, in support of the exceptions.

The case finds that the defendant, being indebted to the plaintiffs in account, procured a negotiable note of Richards & Barker, payable to A. A. Childs, one of the plaintiffs, to be received in part payment; that it was so received, and the account discharged.

On the next day Childs called on the defendant to "indorse" the note, stating that this was the agreement. Wyman denied that he agreed to do so; and on the trial there was testimony tending to show that Wyman did, and that he did not, agree to do so. Childs urged Wyman to indorse the note. Wyman refused to do so, in such manner as to be holden, and thereupon wrote his name *on the back,* adding the words "*without recourse.*"

The first instruction is erroneous.

The words "without recourse" are legally operative to exempt the defendant from liability to pay the note. *Davis* v. *Sawtelle,* 30 Maine R., 389; Chitty on Bills, 228, 10th Am. ed.; Story on Notes, s. 146; *Waite* v. *Foster,* 33 Maine R., 424.

If Wyman agreed to indorse the note in blank, in the usual manner, he did not do so; and the plaintiffs, as indorsees, can recover only upon the contract as made, and not upon one made with Childs and never executed, and which could not be negotiated to them.

To hold, as the instructions state, that the defendant is liable to pay the note, if he agreed to put his name on it, *is to make a contract for him directly opposed to his written stipulation made at the time on the back of the note.* It is to make him say in substance, I promise to pay the note, when he made a declaration in writing upon it, at the time, *that he did not so promise, and that he would not be holden.* And it does this by admitting parol testimony to have the effect,

not only to vary his written stipulation, but to destroy it utterly.

And it does so, in the face of the decision of this court, that the legal effect of a blank indorsement cannot be varied by parol testimony. *Crooker* v. *Getchell*, 23 Maine R., 392.

Much less can it be received to destroy the legal effect of a written stipulation, introduced expressly to qualify the indorsement. *Smith* v. *Frye*, 14 Maine R., 457; *Haywood* v. *Perrin*, 10 Pick. R., 228; Story on Notes, s. 473.

The instructions substitute a parol contract to pay, in place of a *written denial* of all liability; and make the defendant promise absolutely to pay, when he has declared in writing on the note that he will not be bound to pay it.

The instruction which states, "that if the defendant put his name on the note, when it was given to Childs in payment of the plaintiffs' account, they would be entitled to recover of the defendant," was erroneous for another reason. It took from the consideration of the jury all the facts and circumstances respecting the intention of the parties in having his name upon it, and placed the right to recover on the simple fact alone considered, that the defendant put his name upon the note; while all the cases, however they may differ in other respects, agree that all such facts and circumstances should be considered to ascertain the intentions of the parties, and to determine the effect of such kind of signatures. Story on Notes, ss. 479, 480.

The intentions of the parties are to be thus ascertained, to interpret the language used, but not vary or set it aside.

It was also calculated to mislead the jury, by stating to them what the effect would be if the defendant put his name on the note "when it was given to Childs," when there was no testimony in the case tending to prove that it was put on, at the time—the proof being clear and uncontradicted, that it was not put on till the day after the note was given to Childs.

In *Irish* v. *Cutler*, 31 Maine R., 536, it was held, that when such a note was indorsed by a third person, before an in-

dorsement by the payee, the presumption of law would be, that he designed to become an original promisor.. But the case does not decide, that when the facts and circumstances attending the signature are proved, that they are not to determine the effect of the signature. Nor do the cases of *Malbon* v. *Southard*, 36 Maine R., 147, and *Leonard* v. *Willis*, 36 Maine R., 266, so decide, and I am unable to find any case that does so decide.

The testimony in this case shows, that if the defendant was to be liable at all, he was to be liable as indorser, which might have been effected by Childs' indorsement and the defendant's indorsement. Yet the instructions required the jury to find that the defendant became an original promisor, without regard to the testimony proving that he was to be an indorser.

Another error consists in allowing the plaintiffs, *as indorsees* of Childs, to have the benefit of any special agreement or representation made between Childs and the defendant, such as the alleged agreement made between Childs and the defendant, that the defendant would become liable to pay the note, which was never carried into effect, and the alleged representations made respecting the solvency of Richards & Barker. These constituted no part of the note—they were not negotiable, and could not be transferred to the plaintiffs.

Even a *written* guaranty made upon a note is not negotiable, and the benefit does not pass to an indorsee. *Springer* v. *Hutchinson*, 19 Maine R., 359; *Myrick* v. *Husey*, 27 Maine R., 9; Story on Notes, s. 481.

An agreement or representation not reduced to writing, and signed by the party, is incapable of being negotiated. Nor can an indorsee avail himself of the benefit of it, or be prejudiced by it, unless it operates upon the contract itself. And hence it is, that a mere promise made to the holder of a note to pay it, will not pass to a subsequent indorsee. *Little* v. *Blunt*, 9 Pick. R., 488.

I submit, therefore, if the defendant, by his language and conduct, had authorized Childs reasonably to entertain any

belief, and thereby induced him to accept the note, the plaintiffs, *as indorsees*, could derive no rights or benefit from it, for the recovery of the note. Yet the instructions, erroneously, I insist, allowed the plaintiffs, as indorsees, to have the advantage of agreements, belief, and representations, existing—if they existed at all—only in verbal communications between Childs and the defendant.

HATHAWAY, J. Assumpsit on a joint and several promissory note, signed by Richards & Barker and the defendant, payable to A. A. Childs or order, and by him indorsed to the plaintiffs. The defendant signed the note on its back, and wrote under his signature the words "*without recourse.*" The law is settled in this state, that the defendant's signature, on the back of the note, had the same effect to make him an original promisor, as if he had signed on its face, with Richards & Barker, and there being no other date than the date of the note, the presumption is, that he signed it when they did, or agreed to sign it, and subsequently did so, in pursuance of such agreement.

The words "*without recourse*" can have no legal effect, touching the defendant's liability; they are words applicable to an indorser—not to an original promisor, and are therefore mere surplusage. *Lowell* v. *Gage et als.*, 38 Maine R., 35.

If the defendant intended, by writing those words under his name, to avoid the liability incurred by his signature, that would not avail him. In a case where a note was written thus: "Borrowed of J. S., £50, which I promise *not* to pay," it was rightly held that "the word *not* shall be rejected, for a man shall never say, I am a cheat and have defrauded." Bayley on Bills, 6, and cases cited by the plaintiff's counsel.

The case finds that the defendant did not sign the note till the next day after it was signed by Richards & Barker, and the plaintiff contends that the evidence shows that he did it then, in pursuance of an agreement to do so at its in-

ception, and the jury found specially that he was liable as an original promisor.

Considering the fact that by the defendant's signature to the note, the *presumption* is, that he was an original promisor, in connection with the evidence in the case, we are of opinion that he was not aggrieved by the instructions given the jury upon that question. This case does not appear to be essentially distinguishable from *Moies* v. *Bird*, 11 Mass. R., 436. See also *Sampson* v. *Thornton*, 3 Met. R., 275.

Exceptions overruled.

GEORGE C. SMALLEY ET ALS. *versus* JOHN B. WIGHT.

It is competent for the maker of a promissory note or the drawer of a bill, to make it payable to the order of himself; but such note or bill cannot be negotiated in the first instance except by the indorsement of the payee or his legal representative, so as to enable the holder to maintain an action thereon in his own name.

The negotiability of paper payable to order, is not recognized by the common law, but depends entirely upon the custom of merchants, which custom requires that the assignment be made by a writing on the bill directing the contents thereof to be paid to some third person.

A note or bill payable to the order of the maker does not become a binding contract until indorsed by him.

The facts of this case were agreed as follows:

This action is ASSUMPSIT on two promissory notes.

The notes were given by the defendant to one who sold them to the plaintiffs for a full consideration, and were in the following words, viz.:

"$25.00. THOMASTON, Oct. 7, 1856.

Six months after date, I promise to pay to the order of myself twenty-five dollars, value received, at the Thomaston Bank, with interest. Signed, J. B. WIGHT."

On which the defendant indorsed his name.

The second note declared on was as follows:

"25.00. THOMASTON, Oct. 4, 1856.

Nine months after date, I promise to pay to the order of myself twenty-five dollars, value received, at the Thomaston Bank, with interest. Signed, J. B. WIGHT."

The defendant did not indorse his name on the back of the note; but the plaintiffs, after the note came into their hands, indorsed it: "Pay to *Smalley, Weed & Bartlett.*"

It is admitted that demand was duly made upon the defendant at the Thomaston Bank, at the maturity of the notes, by the plaintiffs, who were then the holders thereof.

The question submitted to the court is, whether the action can be maintained for the *second* note declared upon. If not, it is to be stricken from the writ, and the default to be for one note only and interest.

A. P. Gould, counsel for the plaintiffs.

The only question submitted to the court, is whether the second note declared upon is a negotiable promissory note, or a "promissory note" in the acceptation given to that term, in commercial law.

Was it *indispensable* that the defendant should sign upon the *back* as well as on the *face?* This will be contended for by his counsel.

The instrument is negotiable in form, and it will not be denied, that if it had been indorsed by the defendant, it would have become a promissory note.

Is not the *intention* of the defendant as well indicated by *once* signing, as *twice?* viz.: to make the instrument a negotiable note.

The well known rule in the construction of contracts is, to carry out the *intent* of the parties.

The defendant writes a note, promising to pay to *his own order* a certain sum, and thereupon *signs it*—the *effect* of which is, to *order the amount to be paid to any person to whom he shall deliver it;* and in such case, any person to whom it had been lawfully transferred, might write an order

over the defendant's signature, to pay to himself, as in the case of a blank indorsement, by a promisee.

"If a person draws an order *upon himself*, or payable by himself, it is, or at least may, although in the *form of a bill*, be treated as a *promissory note*." Story on Notes, s. 16; *Starke* v. *Cheesman*, Carth. R., 509; *Dehers* v. *Harrott*, 1 Shower R., 193; *Joscelin* v. *Lasene*, Fort. R., 282; *Roach* v. *Ostler*, 1 Mann. & Ryan R., 120.

Bayley says an "order may be addressed to the person making it; in other words, a man may draw upon *himself;* but in legal operation, it is rather a *note* than a bill." Bayley on Bills, ch. 1, s. 2.

In *Starke* v. *Cheesman*, Christopher Cheesman, (the defendant,) being in Virginia, drew upon Christopher Cheesman in Ratcliff, which in truth was *himself*, and the plaintiff had judgment on it as a bill.

In *Dehers* v. *Harrott*, the defendant drew a bill on himself, and had judgment as on a bill.

Robinson v. *Bland*, Burr R., 1077, is a similar case.

In the case at bar, it is true that no person is named (other than the defendant) in the note, and it may be said, there is no *promisee*, and the contract is *incomplete*. But I contend that there are *two ways* of answering this objection. It may be regarded as a note payable to the *bearer;* or as payable to *himself*, and the signing be regarded as an order by the defendant, that the contents be paid to any person *to whom he passed it.*

It was executed and *delivered* as a promissory note, regarded as such by the parties, and if possible it is the duty of the court to give it that effect. It is a *promissory note*, or it is *no contract at all.*

Richards v. *Macey*, 14 Meason & Welsby R., 448, was an action on such a note.

This is not the case of a note made by a man *to himself, simply*, but to his *order;* and being signed by the defendant and by him, thereupon delivered to a person for value, that person had a right to write his own name upon it, *as payee.*

If necessary, it might be treated as a note, signed *in blank*, by the defendant, and delivered to the plaintiffs for value; in which case they would have a right to fill it up, by writing their own names, as payees.

There is a money count in the writ, and on that— whether it be treated as a *note* or a *bill*—the plaintiffs may recover.

E. Wilson, counsel for the defendant.

MAY, J. It is competent for the maker of a promissory note or the drawer of a bill, to make it payable to the order of himself. This mode of creating negotiable paper is found to be convenient, especially in our commercial cities, because when such paper has been properly issued, it may be transferred by the holder by delivery, and it does not require his indorsement to make it further negotiable. The practice of issuing such paper has now become very common, and its validity, when indorsed by the maker or drawer, is not questioned.

It is well settled, that notes and bills payable to order cannot be negotiated in the first instance, except by the indorsement of the payee or his legal representative, so as to enable the holder to maintain an action thereon in his own name. The negotiability of such paper does not exist by the common law; it depends entirely upon the custom of merchants; and this custom, says EYRE, C. J., in *Gibson* v. *Minet*, 1 Hen. Bla., 605, "has directed that the assignment should be made by a writing on the bill, called an indorsement appointing the contents of the bill to be paid to some third person;" and such is now the well, if not universally, established law in relation to bills and promissory notes, when made payable to the order of any other than a fictitious payee. *Bolles* v. *Stearns*, 11 Cush. R., 320; *Foster* v. *Shattuck*, 2 N. H. R., 446; *Cook* v. *Fellows*, 1 Johns. R., 143.

It is contended that the rule above stated does not apply to a bill or note which is payable upon its face to the order of the drawer or promisor. No case has been cited to establish such a proposition; and we are aware of no principle

upon which such paper can be treated as payable to the bearer, so as to pass the legal title in the first instance, by a mere delivery. It is no better than blank paper, so long as it remains in the hands of the maker; and although it has the form, it has not the legal vitality of a contract. It becomes a contract only by being negotiated. Its very language indicates the intention of the maker to determine the extent of its negotiability; and if he chooses he may limit or restrict it, or he may make it general. The fact that it is *payable to his own order* manifestly shows the purpose of appointing for himself, by his own order, the person to whom it shall be paid, and of fixing the extent of the power of negotiation with which his appointee shall be clothed. If it had been his intention to make the paper in itself negotiable by delivery, without any order or indorsement of his own, the insertion of the word bearer would have been the natural and appropriate mode of doing it. We cannot doubt, for the reasons already stated, that such paper is invalid as a contract until it is indorsed. It is the indorsement alone which gives it efficacy. The plaintiff, therefore, cannot recover upon the note declared upon in the second count, the same not having been indorsed by the payee; and being void, it will not sustain the action upon the money count. *Sherman* v. *Goble*, 4 Conn. R., 246; *Taylor* v. *Benney*, 7 Mass. R., 479.

According to the agreement of the parties, the second count in the writ is to be stricken out, and the defendant is to be defaulted for the amount of the note and interest described in the first count.

Defendant defaulted.

TENNEY, C. J., RICE, HATHAWAY, APPLETON, and DAVIS J. J., concurred.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

WHO HEARD AND DETERMINED THE CASES

FOR THE

MIDDLE DISTRICT,

1858.

———o———

HON. JOHN S. TENNEY, LL. D., CHIEF JUSTICE.
HON. RICHARD D. RICE, J.
HON. JOSHUA W. HATHAWAY, J.
HON. JOHN APPLETON, J.
HON. SETH MAY, J.
HON. WOODBURY DAVIS, J.

ALL OF WHOM CONCURRED IN THE OPINIONS IN THE CASES

FOLLOWING, UNLESS OTHERWISE INDICATED.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1858.

———o———

COUNTY OF SOMERSET.

———o———

NATHAN FOWLER *versus* GEORGE KENDALL ET ALS.

A certificate of discharge of a bankrupt will be a discharge of his liability to his sureties upon an official bond, when it appears that the debt against the principal and sureties might have been proved under the Bankrupt Act.

A breach of an official bond subsequent to the filing of a petition to be declared a bankrupt, could not have been proved as a claim in the proceedings upon such petition.

This is an action of DEBT against the defendants, as sureties of one Samuel Burrill, upon a bond given by said Burrill, as deputy sheriff, to the plaintiff, as sheriff. The bond is dated March 15, 1837. The writ is dated March 2, 1857.

All the defendants, except Kendall, have been defaulted, and the following case is stated to determine his liability. Upon facts agreed by the parties, said Samuel Burrill made default, for which his said sureties were originally liable, as follows:

1. He failed to pay his "per centage" to the sheriff, for the years 1837 and 1838.

The amount from March 16, 1837, to December 1, 1837, was $17.44. The amount from December 1, 1837, to July, 1838, was $9.70.

2. One Henry Tucker recovered judgment against the plaintiff, for the default of said Burrill, as his deputy, on the second day of July, A. D. 1842, for the sum of $43.67, debt or damage, and $9.61 costs of suit. This default occurred between March 16, 1837, and February 27, 1838, and said sums were paid by the plaintiff.

3. One Church Williams, on the twenty-first day of November, A. D. 1838, recovered a judgment against the plaintiff, for the default of said deputy, occurring during the time aforesaid, for the sum of $86.82 damages, and $8.99 costs of suit. Of this a portion was paid by Samuel Burrill, and the balance, amounting to $53.10, was paid by the plaintiff, March 16, 1846, with $4.31 costs in a suit on said judgment.

The said Kendall was duly discharged as a bankrupt, under the act of Congress passed August 19, A. D. 1841. He filed his petition September 23, 1842; was duly declared a bankrupt October 25, 1842; filed his petition for a full discharge November 14, 1842; and was fully dscharged September 12, 1843.

If said discharge in bankruptcy is a defence to this suit, judgment is to be rendered for said Kendall for his costs, and against the other defendants upon the default. If the said discharge is not a defence to any or all of the plaintiff's claim, the said Kendall is to be defaulted, and the court to assess the damages.

J. H. Drummond, counsel for the plaintiff.

I. These claims of the plaintiff are debts "created in consequence of a defalcation as a public officer, or while acting in a fiduciary capacity," and therefore the defendant's discharge is no bar. Bankrupt Act, s. 1.

A fiduciary creditor, who has not proved his debt, may

sue for and recover it from the discharged bankrupt, by showing that it was within one of the exceptions. *Chapman* v. *Forryth*, 2 Howard R., 202, 209; *Morse* v. *City of Lowell*, 7 Met. R., 152; *Fisher* v. *Currier*, 7 Met. R., 430; *Hayman* v. *Pond*, 7 Met. R., 328, 330; *Frost* v. *Tebbetts*, 35 Maine R., 188.

The claims in suit were created in consequence of a defalcation as a public officer. The principal in the bond was a deputy sheriff, and he would not have been discharged by proceedings in bankruptcy. The surety owes the same debt as the principal, and as to the obligee, all the obligors are principals.

Besides, it will be observed that the act does not apply *solely* to debts arising from the defalcation *of the person pleading the discharge*, but to all debts "created in consequence of a defalcation as a public officer." This includes all debts created in consequence of the defalcation, whether against the defaulter or others. All the claims sued for were created in consequence of Burrill's defalcation. Hence the defendant's discharge is no bar, if Burrill was a public officer. That he was a "public officer," seems too plain for argument.

A collector of taxes is a public officer, within the first section of the Bankrupt Act, and a debt which he owes the city in consequence of a defalcation in his office of a collector, is a fiduciary debt, and not barred by a discharge in bankruptcy. *Morse* v. *Lowell*, 7 Met. R., 152; see U. S. Digest, vols. 7, 8, 9, 10, 11 and 12, in which sheriffs are spoken of as "public officers."

It is not necessary for the plaintiff to prove that he did not prove his debt, and take his dividend. It is matter of defence to show that he did. "A plea of bankruptcy must allege that the debts are not within the excepted clause, or the plaintiff will recover." *Frost* v. *Tebbetts*, 30 Maine R., 188. The defendant, Kendall, is therefore liable for the whole claim. As to the damages: The item of $17.44 was due December 20, 1837, and therefore, and also because the

bond so provides, the plaintiff is entitled to recover interest thereon from that date. R. S. of 1840, ch. 104, ss. 57 and 58. For the same reason, he is entitled to recover interest on the item of $9.70, from December 20, 1838. He is also entitled to recover the other items paid by the plaintiff for the default of Burrill, and interest thereon from the time of payment.

As Burrill was duly notified to defend the suits, he was, and the defendant is, liable for the amount paid as costs in these suits, and interest thereon.

II. But if the defendant is not liable for the whole claim on the grounds above stated, he is still liable for the last item claimed and interest, on the ground that that item was not provable in bankruptcy.

This bond was a continuing security, and each successive failure to comply with the condition was a new breach, and a new cause of action. *Austin* v. *Moore*, 7 Met. R., 116, 122. The first breach, therefore, did not make the whole bond provable, but each breach would be provable as it happened.

It is well established, that a debt or claim not provable in bankruptcy, *at the time of the filing of the petition*, or a judgment recovered upon any debt provable or not, *after the filing of the petition*, is not barred by the discharge. *Woodward* v. *Herbert*, 24 Maine R., 358; *Wilkins* v. *Warren*, 27 Maine R., 438; *Holbrook* v. *Foss*, 27 Maine R., 441; *Ellis* v. *Ham*, 28 Maine R., 385; *Fisher* v. *Foss*, 30 Maine R., 459; *Doe* v. *Warren*, 32 Maine R., 94; *Pike* v. *McDonald*, 32 Maine R., 418; *Leighton* v. *Atkins*, 35 Maine R., 118; *Wran* v. *Hondlett*, 30 Maine R., 15; *Bennett* v. *Bartlett*, 6 Cush. R., 225; 7 Cush. R., 592, 594; 2 Cush. R., 173; *Woodbury* v. *Perkins*, 5 Cush. R., 86; 4 Cush. R., 607.

Were these claims then provable at the time Kendall filed his petition, September 23, 1842? As to the first three items, there had been a breach of the bond, and they were therefore provable. As to the last, the plaintiff had not then been damnified. He was not until 1846, when he paid it. It is submitted that this item was not provable, until after

the plaintiff had paid it. The plaintiff had no demand against Burrill, until he had paid something for Burrill's default. He could maintain no action upon this bond until he had paid something. *Jennings* v. *Norton*, 35 Maine R., 308. Burrill might at any time pay the claim to Williams, and save the plaintiff harmless. It was not, then, a contingent demand. There was merely a contingency, that there might be a demand.

"There is a distinction between a contingent demand, and a contingency whether there ever will be a demand. The former is a demand which might have been proved under the bankrupt law, but the latter is not." *Woodward* v. *Herbert*, 24 Maine R., 358.

The case just cited was by a creditor against a surety on a bond, given on mesne process. The bond was given before the surety filed his petition. Judgment in the original suit was recovered afterwards. The court held the discharge was no bar. The fact of the existence of the debt sued in the original process on which the bond was given, did not decide that the plaintiff could prove his claim against the surety, because it was contingent whether the surety would ever be called on.

In *Bartlett* v. *Bennett*, 6 Cush. R., 225, the defendant sold the plaintiff some wire, which the plaintiff sold. A third person commenced an action against the plaintiff, for the wire, claiming under a prior title. Pending the action, and before judgment, the defendant (Bennett) filed his petition under the Bankrupt Act. The plaintiff, after satisfying the judgment, sued the defendant on the breach of his warranty of the title to the wire. The court held, that inasmuch as the plaintiff had paid nothing at the time of the filing of the petition, he had nothing provable against the defendant, and therefore the discharge was no bar. Before the petition was filed, there was a breach in the warranty of the title to the wire, and an action had been commenced against the plaintiff for its value, but in spite of all this, the court held, that as the plaintiff had not then paid anything, and it was not cer-

tain that he ever must, he had no provable claim. This is analogous to the present case. In this case, the plaintiff had paid nothing, and it was not certain he would ever be compelled to do so. In fact, Burrill did pay a part of that judgment, as the case shows.

In *Ellis* v. *Ham*, 28 Maine R., 385, a surety sued his principal for money paid *after* the principal filed his petition as a bankrupt, as his surety on a constable's bond. The official neglect which caused a breach of the bond, occurred *before* the petition was filed. But the court held the discharge was no bar, because the claim was not provable until the surety *paid something.* Before that there was only a contingency of his being compelled to pay something, and such a contingency could not be proved. The language and reasoning of the court, in that case, apply directly to this.

The same general principle was asserted in *Doe* v. *Warren*, 32 Maine R., 94; *Pike* v. *McDonald*, 32 Maine R., 418, and in *Leighton* v. *Atkins*, 35 Maine R., 118.

In *French* v. *Morse*, 2 Gray R., 111, the court cite with approval several of the cases above cited, and hold that when there is a contingency whether there will ever be a demand, such claim was not provable.

The case was in the nature of covenant against the defendant, upon a covenant against incumbrances in a conveyance of real estate. There was an incumbrance, a mortgage, but at the time the petition was filed, the plaintiff had paid nothing to remove it. Afterwards he did so, and brought this action. The court held the defendant's discharge no bar, because when the petition was filed, it was contingent whether the plaintiff would ever have any demand; the defendant might have paid it; and that contingency existed until the plaintiff paid something. So in this case, Burrill might have paid Williams' judgment. Had he done so, the plaintiff would never have had any claim therefor. Until this plaintiff paid something, it was contingent whether he would have any demand or not.

Nor does the case of *Mace* v. *Wells*, 7 How. R., 272, con-

flict with this. That was an action *by* and not *against* a surety, and was decided on the ground that the fifth section of the bankrupt act *expressly* provides for that particular class of cases. See *French* v. *Morse*, 2 Gray R., 111, 113.

According to the authorities cited, if the defendants, other than Kendall, pay this judgment, they will have a claim against Kendall for contribution, to which his discharge will be no bar. *Ellis* v. *Ham*, 28 Maine R., 385; *Doe* v. *Warren*, 32 Maine R., 94; *Lewis* v. *Brown*, 41 Maine R., 448, 451.

If Kendall is charged in this case, it will do directly what would be accomplished indirectly by another action.

As to the damages, if this view of the case is taken by the court. The defendants will all be defaulted, and judgment entered for the penal sum in the bond. Execution should issue against the other defendants for the plaintiff's whole claim and costs up to the time of the default, and against Kendall for the last item claimed and interest thereon, and full costs up to the time of judgment.

W. B. Snell, counsel for the defendants.

Could this defendant have plead his discharge in bankruptcy in bar of the claims alleged in the plaintiff's writ at a certain moment?

Obviously he could not, for it was not obtained until September 12, 1843; and his first petition was filed September 23, 1842, two months after Tucker obtained his judgment against the plaintiff, and for a still better reason, if he had his discharge he was not a party to new suits. Those suits did, however, establish the fact of Burrill's default, and the amount of damages, and consequently the fact of the liability of this defendant as said Burrill's surety, and the amount of the liability.

Is the discharge in bankruptcy a defence to the liabilities of a surety in a bond of this description?

The fifth section of the act to establish a uniform system of bankruptcy, provides that "all creditors, whose debts are

not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, and other persons having uncertain or *contingent demands* against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them."

Had the plaintiff a contingent demand, provable under this act, against this defendant, and were the claims and demands sued for in this action of this character, at the time of the proceedings in bankruptcy on the part of this defendant?

In the case of *Woodward* v. *Herbert*, 24 Maine R., 358, it is said, this clause was probably designed to embrace such debts or claims as the statute of 6 Geo., 4, ch. 16, ss. 51, 53, 56, had authorized to be proved under an English commission; and by the English courts it is decided, "any debt payable upon a contingency, includes actual contingent debts only."

That was an action upon a bond given according to the provisions of chapter 148, section 17, of the statutes of 1841, conditioned that the principal should, within fifteen days after judgment, notify the creditor, for the purpose of examination and disclosure.

The court say "it is necessary to distinguish between a "contingent demand" and a "contingency whether there ever will be a demand," and put the case of the surety upon a bond to liberate a poor debtor from arrest on execution—as one when the debt was payable upon a contingency, and that of the surety on a bond to liberate from arrest on mesne process—as one presenting the contingency, whether there ever would be a demand.

In the one case the surety on the bond obliges himself to pay it, if the principal does not, or does not surrender himself to the prison keeper, or does not procure his discharge by taking the poor debtor's oath. The debt is a contingent debt, and can be proved against the bankrupt.

Not so in the case of a bond to release from arrest on mesne process. There is no obligation to pay the debt in any event, if one should be finally established.

This defendant was liable to the plaintiff as the surety of Burrill, upon his deputation bond. Liability was contingent upon default of Burrill. When default was made, and any condition of the bond was broken, a demand or claim or debt existed against the defendant, capable of computation, and absolute within the meaning of the Bankrupt Act.

If the default was of the first class embraced in this action, the case shows the amount *was* ascertained, and amounted to $27.14, and was clearly provable against the defendant, under the Bankrupt Act.

The second default became absolute when the judgment against the plaintiff in favor of Henry Tucker was rendered, and the plaintiff paying it, could have proved this under the Bankrupt Act, against the defendant; and so of the third default.

It may be said that the plaintiff paid a portion of the claim sued for in 1846. That leads us to inquire:

Does the payment by this plaintiff, in A. D. 1846, of this judgment in favor of Church Williams, change the liability of the defendant?

We respectfully contend, it does not. John Williams recovered judgment against Fowler for the default of Burrill. A new debt was created. The origin of the debt—the default of Burrill—is merged, and the form lost sight of and extinguished by the judgment. *Holbrook* v. *Foss*, 27 Maine R., 441.

Whatever suits and costs may arise between the parties to that judgment, the surety, this defendant, has no interest in, and cannot be bound by. The surety is by the bond to make good the default of Burrill to the plaintiff, but is he also to answer for the neglect of Fowler to pay Williams? Can Fowler suffer suits to be multiplied infinitely against himself upon this judgment, or successive judgments, and claim to recover them with costs of this defendant, in a suit

upon this bond? We think he cannot. And if it be said, he should have plead his discharge in bankruptcy in the suit commenced in 1846, upon the judgment recovered by Williams in 1858, we say he could not, for this judgment created a new debt, to which this surety was a stranger, and was in no sense a party to it. But it does not appear by the case, that any judgment was recovered in 1846, in the suit commenced upon the judgment recovered in 1838, or that such suit was ever entered in any court.

Therefore this surety could have had no opportunity to have plead his discharge, were he otherwise entitled to do so. This last suit was settled by Fowler, the plaintiff, in this action, without the agency or interference, in any manner, of this defendant, and he can in no sense be bound by any of Fowler's doings in this settlement.

We therefore submit that the discharge in bankruptcy of the defendant, is a full and complete defence to the plaintiff's claim, in this action, and cite as additional authorities, *Woodward* v. *Herbert*, 24 Maine R., 358; *Loring* v. *Kendall*, 1 Gray R., 305; *Mace* v. *Wells*, 7 How. R., 272; *United States* v. *Davis*, 3 McLean R., 484, 485; *Rand* v. *Pierce*, 36 Maine R., 455; *Tobias* v. *Rogers*, 3 Kernon R., 59.

May, J. In this action the defendant, Kendall, relies upon his discharge in bankruptcy as a defence. The other defendants are defaulted. The validity of the proceedings in bankruptcy is not denied. The only question raised is as to their effect in regard to the several items which the plaintiff claims to recover under the bond in suit. These claims, it appears, are for monies received and liabilities incurred by the principal defendant, while acting as a deputy sheriff under the plaintiff; and it is contended that a surety for the performance of the obligations and legal duties of the principal, arising out of this official or fiduciary relation, stands in the same position as the principal, for whose fidelity he is bound; and that, therefore, his certificate in bankruptcy presents no obstacle to the plaintiff's recovery against him.

We do not so understand the law. The surety can in no proper sense be regarded as having violated any official or fiduciary trust. His sole responsibility rests in his contract. That clause in the Bankrupt Act, excepting from its operation all debts created in consequence of a defalcation as a public officer, or in a fiduciary capacity, has reference only to the defalcations of the bankrupt himself. No legal disability or odium attaches to the surety. His certificate, therefore, will be regarded as a discharge of such liability, when it appears that the debt against the principal and surety might have been proved under the Bankrupt Act.

The bond in suit was a continuing indemnity, and each and every breach of it was a good cause of action, affording to the plaintiff an ample remedy *when*, and *only when*, they severally occurred. All his claims, therefore, resulting from any breach prior to September 23, 1842, when the defendant, Kendall, filed his petition to be declared a bankrupt, are barred by his discharge, while all other claims originating in any subsequent breach of the bond will not be affected thereby. These claims could not have been proved under the Bankrupt Act, as the numerous authorities cited for the plaintiff clearly show.

In accordance with these views, the plaintiff's claim "for per centage," and for the amount paid by him in July, 1852, upon a judgment recovered against him for the default of Burrill, cannot be recovered as against the defendant, Kendall, the same being barred by his certificate; but the defendant must be held liable for the amount paid by the plaintiff, March 6, 1846, upon the execution against him in favor of Church Williams—such payment constituting a new breach of the bond, after the proceedings in bankruptcy had been closed.

Upon the facts stated, the defendant, Kendall, is to be defaulted, and judgment is to be rendered against all the defendants for the penalty of the bond; and execution is to issue against them for $53.10, and interest from March 16, 1846; and another execution is to issue against the other

two defendants for the other items which the plaintiff claims, with interest from the times when each, according to the terms and condition of the bond, should have been paid.

Defendant, Kendall, defaulted.

TENNEY, C. J., RICE, APPLETON, HATHAWAY, and DAVIS, J. J., concurred.

SAMUEL S. PARKER *versus* JOB N. TUTTLE.

Where the plaintiff took a note on demand, as the agent of the payee, and afterwards purchased it, which was not indorsed to the plaintiff till more than four months after its date, it was held to be dishonored so as to let in any equitable defence to the note.

And if the payer disclosed no defence to the agent when he gave the note, or at the same time promised to pay a portion of it at a time future, he is not thereby estopped to set up an existing defence to the same.

EXCEPTIONS were taken to the rulings of GOODENOW, J., in this action, which is ASSUMPSIT upon a note of hand, dated 15th of November, 1852, for $41.53, payable on demand, with interest, to Charles H. Strickland or order, and by him indorsed.

Plea, the general issue, and brief statement, alleging the note to have been given in part for spirituous and intoxicating liquors, sold in this state in violation of law, &c.

There was evidence tending to show that the note was given in settlement of a balance due said Strickland, and included a barrel of rum; and evidence tending to show that it was sold in this state by Strickland, to the defendant, in violation of law, and also to show that it was not.

The note was given in Smithfield, in this county, and taken by the plaintiff, who then was agent for Strickland, who then and since lived in Boston, Massachusetts, or its immediate vicinity.

The plaintiff's home is Waterville, Maine.

When the note was given the items of the account were not present. The defendant objected to giving the note and stated there were some matters between Strickland and him which he wished to arrange with Strickland. The plaintiff said it should make no difference. He did not disclose to the plaintiff what they were, nor say anything about spirituous or intoxicating liquors.

It did not appear when the note was negotiated to the plaintiff, but there was evidence tending to show that it was more than four months after it was given, and before the writ was made.

It was contended by the defendant, that if the note was given in part for spirituous or intoxicating liquors, sold in this state in violation of law, it was absolutely void.

Also, that after the lapse of more than four months from its date, the note was dishonored, and so the proposed defence, as to its consideration, available against the holder of the note.

The court instructed the jury that the note was not absolutely void, but would be collectable in the hands of the present holder, if he held it *bona fide*, for a valuable consideration, and without notice that it was given in part for an illegal consideration. But that if he was a mere nominal party, prosecuting the action in his own name, for the benefit of Strickland, the defence, if proved, would be available.

The court also instructed the jury, that the note would not be dishonored necessarily by reason of the lapse of more than four months from its date, because, if it was given to and received by the plaintiff, acting as agent of Strickland, and no such defence as is now set up was then disclosed, and, if they believe the testimony, the defendant promised when he gave the note, and as he was leaving the store when it was given, that he would send him the first ten dollar bill he should get, they might find it was not a dishonored note when received by the plaintiff as his own.

The verdict was for the plaintiff.

John S. Abbott, counsel for the defendant, argued in support of the exceptions.

The instruction that the "note would be collectable in the hands of the present holder, if he held it *bona fide*, for a valuable consideration, and without notice that it was given in part for an illegal consideration," is seriously objected to.

This instruction—especially in connection with the succeeding three lines—wholly ignores "*implied*" notice, which the statute makes provision for, and can be understood in no other sense, than as requiring of the defendant to prove that the plaintiff had *actual knowledge*—"*expressed*," *not* "*implied*," notice of the illegality of the consideration.

It is believed that this instruction is clearly erroneous.

It has been too often decided, to require citings of authorities, that whoever purchases a dishonored note from the payee, is deemed to have *implied* notice of every defence which would have been available, if the note had been sued by the payee. *Tucker* v. *Smith*, 4 Maine R., 415; *Ayer* v. *Hutchins*, 4 Mass. R., 372; *Thurston* v. *McKoren*, 6 Mass. R., 428.

The books are full of cases sustaining this position. It would be pedantic to cite them.

Intimately connected with this, is the erroneous ruling of the court, that this note was not dishonored after it had been overdue "more than four months."

It will be borne in mind, that the defendant lived in Smithfield, Somerset county, when the note was given; that Strickland, the payee of the note, resided in Boston or its vicinity when the note was given, and has resided there ever since—*one day's journey from Smithfield;* that the plaintiff then and ever since has resided in Waterville.

The note was payable on demand—was due the instant it was given, and under the above facts and circumstances, the jury are instructed that the note was not dishonored, though overdue when sold, more than four months. *Thompson* v. *Hale*, 6 Pick. R., 258; *Sylvester* v. *Crapo*, 15 Pick. R., 92;

Bayley on Bills, 2 Am. ed., 135 and 137, and cases cited in notes.

In *Stevens* v. *Bruce*, 21 Pick. R., 193, the note was dated 9th of April, 1831, payable on demand; held to have been dishonored, being shown not to have been indorsed prior to 30th of July, 1831. *Three months and twenty-one days.*

Other cases might be readily cited, but it is believed that there can be no doubt that the note in this case was dishonored after "the lapse of more than four months from its date."

The reasons given for the ruling, that the note was not dishonored after such lapse of time, are quite unsatisfactory, and, it is contended, they are utterly unsound.

First. That the defendant did not set up such defence when the note was given. Such omission would not preclude his setting it up, if the note had been given to Strickland, instead of the agent of Strickland; neither can it preclude him now.

Besides, the defendant said all he could reasonably be required to say, when he objected to giving the note—stating, "there were some matters between Strickland and him which he wished to arrange with Strickland."

And he did not give the note, till the plaintiff assured him that "it should make no difference." After obtaining the note upon this assurance, it is submitted that it is not only legal, but manifestly just and right, that there "should be no difference." That the defendant should stand in the same position as if the action had been in Strickland's name.

The second reason, for the ruling is, that "the defendant promised when he gave the note, and as he was leaving the store where it was given, that he would send him the first ten dollar bill he should get."

The plaintiff was then acting as the agent of Strickland, and a promise to him was a promise to Strickland.

It is not perceived that a *verbal* promise, without consideration, made at the same time the note was given, to pay

$10.00 of the $41.53, can have any more effect in excluding the defence, than the *written* promise, in the note itself, to pay the whole of the $41.53.

J. H. Webster, counsel for the plaintiff.

On November 15, 1852, when the note in suit was given, the statute of 1851, ch. 211, and also the thirteen sections from 10 to 22 inclusive, of chapter 205, of the acts of 1846, were in force. See acts of 1851, ch. 211, s. 18.

The first ruling complained of was, "that the note was not absolutely void, but would be collectable in the hands of the present holder, if he held it *bona fide*, for a valuable consideration, and without notice that it was given in part for an illegal consideration." This instruction is almost in the precise language of the proviso of section 10, chapter 205, of the statute of 1846. The only difference is, the proviso of that section affects the indorsee by implied notice of the illegality of consideration, whereas, in the instruction nothing is said specifically about implied notice. But what did the judge mean by the word notice? Did he not mean to use the term in its technical sense? If he used it in its technical sense, it included not only actual but implied or constructive notice. When a deed is properly recorded, it is notice to all the world of the conveyance, although there may not be ten men in the state who know actually anything about it. So also when a note is overdue, that fact is notice to every person disposed to become a party to it, that there is a defence. The consequences of actual and implied notice are precisely alike, and they are constantly treated and spoken of by jurists in the same manner. It affords no reason for holding the presiding judge to be ignorant, and to use words without a meaning, because very wise legislators in 1846 imagined a distinction, where none really existed.

But what is implied notice "of the illegality of the consideration?" It is any circumstance attending the note or its negotiation, that should put the party upon inquiry, to

ascertain its consideration or taint, if any. A party purchasing a note without inquiry, under such circumstances, cannot complain if he finds it unavailable.

If a note overdue for a year, if you please, be offered to me, and I inquire of the payer if there is a defence, and am told by him there is none, and after that purchase the note, have I any notice, either actual or implied, of any illegality or taint in the inception of the note? Can the maker, after that declaration, set up in my hands any defence against the note, that he could not set up had I purchased the note the day it was made? *Holbrook et al.* v. *Burt et al.*, 22 Pick. R., 546.

Does it make any difference whether the statement is made at the time of the negotiation or of the making of the note? In one case he induces the indorsee by his own declarations, made when he knows of the pendency of a negotiation to obtain said note, to part with his money for it; he is, therefore, estopped to deny the validity of the note. In the other case, at the time of the inception of the note, knowing all its faults or taints, he states to a third person that it will be paid, and gives no intimation of any defence. That third person afterwards becomes the indorsee of the note. He becomes so, relying on the statements of the payer. Shall the payer, if he knew of the taint at the making of the note, be allowed to set up such defence against one who had bought it, relying on the defendant's own declarations? It is to be hoped that the law is subject to no such reproach. The plaintiff was agent for the payee of the note, made the settlement with the defendant, and took it for the payee. The defendant did not set up or name to the plaintiff then, any ground of defence now set up, although, if such ground of defence existed, he knew it then. He promised to send the first ten dollar bill that he got. Induced by that representation, the plaintiff purchased the note, and parted with his money. It is inequitable to allow him to set up this defence. There was, therefore, nothing in the appearance of the note or the mode of its ne-

gotiation, that could imply notice to the plaintiff of any taint in its inception; but everything to contradict it, and show it to be honest and *bona fide*. The case, therefore, did not require instruction as to the effect of implied notice, and the court cannot be required to give instruction on hypothetical cases. The first instruction, therefore, given by the court was all the defendant had a right to ask, and it was unobjectionable. Chitty on Bills, edition of 1833, 246, 247.

The second instruction given by the judge, and excepted to by the defendant, seems to be so entirely for the defendant, that I cannot for a moment believe he intends to push it to the consideration of the court.

The foregoing reasoning would seem to be conclusive as to the last ruling complained of. The language used may not be exactly precise and accurate, but the idea conveyed by it to the jury undoubtedly was this: The plaintiff was the agent of Strickland. As such he received the note. The defendant then disclosed no such defence as is now set up. He promised to send the plaintiff the first ten dollar bill he should get; and the jury, if they believed this, might find that the defendant, by his representations, had induced the plaintiff to buy the note, and thus part with his property, and therefore would be estopped to deny the legality of the consideration. If such be the meaning of this instruction, and it is difficult to give it any other meaning, I am unable to see wherein it is wrong.

All the above is predicated upon the supposition, that the plaintiff did not know what was the consideration of the note. If he did know the consideration at the time it was taken, it is of no consequence whether the note was overdue at its negotiation or not. As to the plaintiff it was dishonored, if tainted at its inception. The rulings requested and given were unnecessary and useless—had no application to the case. For wrong instructions, which by no possibility could affect the case, the court will not set aside the verdict.

The instruction requested, as an abstract proposition,

might perhaps be right, but it had no application to the case.

The plaintiff was the agent of Strickland, the payee of the note, in settling with Tuttle. He had Strickland's account with him, although not the items. He knew all about the consideration of the note. If Strickland had indorsed the note to him, the next minute after it was given, the defendant could have set up all the defence that he could in Strickland's hands. Every defence that could be set up in Strickland's hands was attempted to be proved, and proof allowed, and the jury have found for the plaintiff, thereby negativing the defendant's allegation, that the consideration was illegal. The plaintiff knowing all the consideration of the note, it was of no consequence when it was negotiated. The court will not send this case for a third time to a jury, to correct a ruling of no consequence in the case.

Abbott, in reply:

In regard to the circumstances attending the giving of the note, it will be remembered that the plaintiff was acting as the agent of Strickland, and may well be presumed to have known the subject matter of the accounts settled, especially might the defendant so presume. There was no more occasion for his telling the *agent* at the time, than there would have been for his telling Strickland what the law was, and that he could legally defend and avoid the payment of the note.

There was no intimation at the time, that the plaintiff intended to purchase the note; and there is no foundation for the argument, that the defendant induced the plaintiff to purchase the note, by telling him he would send the first ten dollar bill he should get.

The counsel admits that the note was dishonored, and that the instruction that it was not, is erroneous, but contends that it is immaterial.

I need not reiterate what I have said, and what has been so often decided, that the purchaser of a dishonored note can be in no better position than the payee.

MAY, J. The note in suit was payable on demand, and not indorsed to the plaintiff until more than four months from its date had elapsed. When it was made it was taken by the plaintiff, as the agent of the payee, who then resided in the city of Boston or its vicinity. The defendant was a resident of Smithfield, in this state.

One of the principal questions which arose at the trial was, whether the note was dishonored at the time of its indorsement, so as to let in all the equitable and legal defences existing between the original parties. The presiding judge instructed the jury, that the note would not be dishonored necessarily by reason of such lapse of time before it was indorsed. In view of the authorities cited by the defendant's counsel, and under the circumstances of this case, we are of opinion that the plaintiff, if he did not already know by reason of his connection with the note, and its inception, ought to have been admonished by the length of time which had then elapsed, that some legal or equitable cause existed why it had not been paid. Much shorter periods of time have been held to work the dishonor of similar notes, while no case has been found where so long a period has not been held to produce such effect.

Nor do we think the fact that no ground of defence or intimation of any, was stated to the plaintiff's agent when he took the note, or that a simultaneous promise to pay a part of the note to the payee or his agent as soon as the means could be obtained, the defendant then having no reason to suspect that such agent would become the purchaser or indorsee of the note, takes the case out of the ordinary rule, or in any manner estops the defendant from setting up any existing defence.

The instruction which has been considered being erroneous, it becomes unnecessary to examine into the propriety of the other instructions given, or to consider the correctness of those which were requested and withheld.

Exceptions sustained,
verdict set aside, and new trial granted.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

WHO HEARD AND DETERMINED THE CASES

FOR THE

EASTERN DISTRICT,

1858.

HON. JOHN S. TENNEY, LL. D., CHIEF JUSTICE.
HON. RICHARD D. RICE, J.
HON. JOSHUA W. HATHAWAY, J.
HON. JOHN APPLETON, J.
HON. JONAS CUTTING, J.
HON. DANIEL GOODENOW, J.

ALL OF WHOM CONCURRED IN THE OPINIONS IN THE CASES

FOLLOWING, UNLESS OTHERWISE INDICATED.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1858.

———o———

COUNTY OF PISCATAQUIS.

———o———

STATE *versus* M. LAWRENCE LIBBY.

The previous confessions of one on trial for adultery, that he had a wife, and that the woman with whom he lived was his wife, are admissible as evidence of marriage.

Instructions to the jury that "if from all the testimony in the case introduced for the purpose of proving the marriage of the defendant, they were satisfied beyond a reasonable doubt that he was legally married, and his wife to whom he was legally married was living at the time the crime was alleged to have been committed, they were authorized to find the fact of marriage," were held to be correct.

This was an INDICTMENT against the defendant for adultery, with one Vesta Brown. To prove the marriage of the defendant, the county attorney called Charles H. Chandler, who testified that he had known the defendant ever since he came into Foxcroft, four or five years ago; his family came some time after. He heard the defendant say he had a wife and family, and that he had sent for them. He introduced Mrs. Libby to him as his wife, or as Mrs. Libby.

Calvin Chamberlain testified that the defendant and family boarded with him at his house in Foxcroft; his family consisted of himself, wife and daughter. He introduced her as Mrs. Libby; they occupied one chamber. He lives with her now, most of the time. He had three daughters; he treated them as his daughters.

Edward S. Palmer testified that he had known the defendant six or eight months. His family consists of himself, his wife and two daughters. He could not say as he ever heard the defendant call her his wife.

Josiah B. Mayo testified that he had known the defendant some six years. He boarded at the house of the witness, with his supposed wife and youngest daughter; he said he wanted board for his wife and youngest child. Witness could not say whether he introduced her as his wife, or Mrs. Libby. He usually called her by her Christian name.

Hiram Douty testified that he had known the defendant ever since he moved into Foxcroft. He had visited the defendant's family, but never heard him say he was married.

To all of this testimony the defendant's counsel objected, seasonably as it was offered, as incompetent and inadmissible. But the court admitted it.

Said Chandler and Daniel H. Remick, who were introduced by the county attorney, called the woman with whom the adultery was alleged to have been committed, Vesta Brown. Other witnesses for the state spoke of her as the Brown girl.

Being called herself by the defendant, she swore her name was Vesta A. Brown.

There was testimony tending to prove the commission of the offence charged.

Upon this evidence the court instructed the jury that if, from all the testimony in the case, introduced for the purpose of proving the marriage of the defendant, they were satisfied beyond a reasonable doubt, that he was legally married, and his wife to whom he was legally married was living

at the time of the crime alleged to have been committed they were authorized to find the fact of his marriage.

But if they were not so satisfied, they would find that he was not married.

The counsel for the defendant requested the court to instruct the jury that said testimony, introduced to prove the marriage of the defendant, was insufficient to prove it in the trial of this indictment.

This instruction was refused.

The counsel for the defendant contended, that the indictment having alleged that the defendant committed adultery with Vesta Brown, the state must prove that it was committed, if at all, with Vesta Brown, to maintain the indictment, and that if the name of the woman with whom it was alleged to be committed was Vesta A. Brown, as she herself swore, this allegation in the indictment failed, and they would find a verdict of not guilty.

But the court instructed the jury, that if they were satisfied, from the testimony in the case, that she was as well known by the name of Vesta Brown as Vesta A. Brown, they would be warranted to find that the offence, if it was committed, was committed with Vesta Brown.

The jury returned a verdict of guilty.

A. Sanborn, counsel for the defendant, argued in support of the exceptions.

The evidence of cohabitation and reputation of marriage of the defendant was improperly admitted. *State* v. *Roswell*, 6 Conn. R., 446; Swift's Ev., 140; *Fenton* v. *Read*, 4 Johns. R., 52; *The People* v. *Humphrey*, 7 Johns. R., 314; *Commonwealth* v. *Littlejohn et al.*, 15 Mass. R., 163; *State* v. *Winkley*, 14 N. H. R., 480; *Clayton* v. *Wardell*, 4 Com. R., 231; Phillips' Ev., vol. 4, 254, note 97; Starkie's Ev., vol. 2, 932; *Damon's Case*, 6 Greenl. R., 148.

The great rule established by the highest tribunals is, that a marriage in fact, in contradistinction to a marriage inferable from circumstances, must be proved in indictments for

adultery and bigamy; that direct evidence of marriage, such as the testimony of a witness who was present at the ceremony, and the record or a copy of the record, with proof of identity, is only admissible, and that indirect or presumptive evidence, such as cohabitation, reputation, and confessions, from which a marriage may be inferred, are inadmissible. *Ham's Case*, 11 Maine R., 391; *State* v. *Roswell*, 6 Conn. R., 446.

In this state, confessions of marriage, deliberately and explicitly made by the defendant, are competent and sufficient to prove the marriage. *Cayford's Case*, 7 Greenl. R., 57; *Ham's Case*, 11 Maine R., 391.

To this extent and no more, has the rule been relaxed in our courts. *State* v. *Hodgkins*, 19 Maine R., 154.

A similar doctrine has obtained in South Carolina, Pennsylvania, Virginia and Ohio. *State* v. *Britton*, 4 McCard R., 256; *State* v. *Hilton*, 3 Rich. R., 434; *Warner* v. *Com.*, 2 Virg. Cas., 95; *Com.* v. *Montaglee*, Ashmead R., 272; Archbold's Cr. Pr. & Pl., vol. 5, 611, note, proof.

But in this case at bar, the testimony to prove confessions of marriage, falls far short of confessions deliberately and explicitly made. The confessions or declarations proved, were only that the defendant "said he had a wife and family," and "that he introduced his supposed wife as Mrs. Libby, or as his wife." No witness heard him say he was married. The testimony should have been rejected on this ground.

If this testimony was inadmissible, it was insufficient. But if it was admissible, it was insufficient. *Cayford's Case*, 7 Greenl. R., 57; *Ham's Case*, 11 Maine R., 391; *State* v. *Roswell*, 6 Conn. R., 446; Greenl. Ev., vol. 2, s. 49.

This long established rule of criminal evidence should not be changed or modified further by this court. *State* v. *Roswell*, 6 Conn. R., 446; *State* v. *Hodgkins*, 19 Maine R., 155.

The allegation in the indictment, that the adultery was committed with Vesta Brown, was material, and must be proved. Vesta Brown and Vesta A. Brown are different

names. *Commonwealth* v. *Perkins*, 1 Pick. R., 388; *Commonwealth* v. *Hall*, 3 Pick. R., 262.

It was a clear mistake in the name of the woman. The mistake is fatal.

Besides, on the plea of not guilty, only one single issue was presented to the jury.

The judge submitted the same issue as would have been raised on a plea in abatement for misnomer. This was a new issue, not made by the pleadings, necessitating the jury to pass upon two issues, when one only was before them. If it is wrong in the pleader to raise two issues in one plea, it cannot be right in the court to present two issues to the jury, when only one is formed by the pleadings.

N. D. Appleton, attorney general, for the state.

I. The testimony introduced to prove the marriage in this case, was properly admitted.

The question is, whether the evidence of the defendant's confessions that he had a wife and family, and his acts in living with a woman whom he called his wife, or Mrs. Libby, when he introduced her to the witness, and whom he treated and recognized as his wife, were properly admitted to prove the marriage of the defendant, or whether, in cases like this, there must be direct proof of the fact of marriage.

It is believed that the testimony was properly admitted by the well established rules of evidence, as well as by the authority of adjudged cases.

The voluntary and deliberate confessions of guilt are among the most effectual proofs in the law, and are always admissible in evidence. 1 Greenl. Ev., s. 115; 2 ib., s. 45.

A man's own acts, conduct and declarations, are always admissible in evidence against him. 1 Starkie's Ev., 61.

As against himself, it is fair to presume that his words and actions correspond with the truth; it is his own fault if they do not. 1 Starkie's Ev., 61.

The general principle being admitted, that a man's confessions or admissions are competent evidence against him,

there is no reason why the admission of his marriage should be excluded.

Greenleaf says, no good reason has been given to distinguish this from other cases of admission, where it may be received, though it may not amount to sufficient proof of the fact.

Any recognition of a person standing in a given relation to others, is *prima facie* evidence against the person making such recognition, that such relation exists, and if the defendant has seriously admitted the marriage, it will be received as sufficient proof of the fact. 2 Greenl. Ev., s. 49.

East, in his P. C., vol. 1, 470, says, with respect to a bare acknowledgment, it may be difficult to say that it is not evidence to go to a jury, like the acknowledgment of any other matter in *pais*.

In *Norwood's Case*, confession and cohabitation, &c., were admitted as evidence to prove the relation of husband and wife, in petit treason. 1 East, 469.

So in *Freeman's Case*, for polygamy, a witness proved that he knew the prisoners; that Mary Russell, who was still alive, lived with him, and he acknowledged he had been married to her in Scotland. 1 East, 469.

This testimony has been admitted by this court, as competent evidence to go to the jury in proof of marriage.

Cayford's Case, 7 Greenl. R., 57. This was a case of indictment for lewd and lascivious cohabitation. Proof was admitted that the defendant moved from New Hampshire to Maine, twenty years before, and some years after sent for his "*wife and family*," a woman and two children, whom he received and treated as his wife and children, *calling her his wife*. They continued to live together. He confessed he was married in England.

MELLEN, C. J., in this case, in an elaborate opinion, examined the cases fully, and affirmed the ruling at *Nisi Prius*. That was a case of a foreign marriage. But he states that the court did not mean to say that the deliberate and unequivocal confession of a man charged with adultery, that

he was then a married man, though married in this state, and without any corroborating circumstances, would not be sufficient for a conviction.

In *Ham's Case*, 11 Maine R., 391, the question came again before our courts in the case of a domestic marriage. The whole subject was again considered by the court, and the opinion, as given by the Chief Justice, was, that in the trial of a person for adultery, the marriage necessarily to be proved, in order to sustain the indictment, whether solemnized here or elsewhere, may be proved by the voluntary and deliberate confession of the defendant.

In that opinion he says, we apprehend that the interests of public justice would be advanced by a relaxation of the rules of evidence touching the point before us, and by a more liberal principle applied in the investigation of facts, so that the laws of the land may be more surely enforced against unprincipled offenders, and the public morals be more faithfully and effectually guarded.

It is true the facts in that case, as proved, were held not sufficient to authorize a conviction; but the decision conclusively settles the question, that a marriage may be proved in the mode allowed in this case. The whole argument and reasoning of the opinion is satisfactory and convincing.

The next case where this question, as to proof of the marriage on indictment for adultery, has arisen, is the case of *State* v. *Hodgkins*, 19 Maine R., 155.

There WHITMAN, C. J., recognizes the doctrine as settled, which dispenses with direct proof of the marriage in such cases. An attempt was made in that case to prove a marriage in *fact*, but the proof was not satisfactory; and there being no evidence of the confession of the fact, by the prisoners, the exceptions were sustained.

In this case, it was proved by a sister of the defendant, that she was present at the defendant's marriage, at her father's house, some twenty-five years before the trial, and that the defendant lived with his reputed wife till within eight years, and had nine children by her before they separated.

But the witness could not state by *whom* they were married, and as the government failed to prove the *authority* of the person who solemnized the marriage, the prosecution failed.

Queere. Was this case decided right? After such a lapse of time, would not the jury be justified in *presuming* the *authority* of the person who solemnized the marriage, and being satisfied of the fact, should their verdict have been disturbed? Is the *strictness* of proof here required consistent with reason and sound legal principles? See *Damon's Case*, and cases cited.

Wedgewood's Case, 8 Greenl. R., 75. The only point settled here was, that the *record* of the marriage was held insufficient, without proof of the identity of the parties.

Damon's Case, 6 Greenl. R., 148. Indictment for bigamy. Oral proof that the person who solemnized the first marriage was a settled minister, and had been forty years, and the magistrate who solemnized the second marriage had often *acted* in that capacity, was held to afford a presumption that they acted legally, and is *prima facie* evidence of authority.

Proof by witnesses who saw the marriage is *prima facie* sufficient, and whoever would impeach it must show wherein it is irregular. 2 Dane, Abr., ch. 46, a. 3, 4.

There is no distinction between a marriage and a lawful marriage. Every marriage must be lawful, or it is no marriage. Ib., a. 3, s. 1.

The rule that a marriage in fact must be proved by direct evidence, as contradistinguished from one inferable from circumstances, in cases of adultery, is founded on a *dictum* of Lord Mansfield, in the case of *Morris* v. *Miller*, 4 Bur., 2059, in which he states that in prosecutions for *bigamy*, a marriage in fact must be proved. That was a civil action for criminal conduct, and a marriage in fact was required to be proved. But that opinion was afterwards qualified by Lord Mansfield, in the case of *Bent* v. *Barlow*, Douglass R., 174, in which he says, an action of criminal conduct has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes, giving the name and char-

acter of *wife* to women to whom they were not married, it struck me, in the case of *Morris* v. *Miller*, that in such an action a marriage in *fact* must be proved, and refers to a case before DENNISON, J., who admitted *other proof* of an actual marriage. And as to the proof of *identity*, whatever is necessary to satisfy a jury is *good evidence*. Suppose the bell ringers were called, and proved that they rung the bells, and came immediately after the marriage and were paid by the parties; or suppose persons were called who were present at the *wedding dinner*, &c.

And BULLEN, J., said, "Suppose a maid servant should be called, and proved that the woman always went by another name, *A*, till that day, when she went out, and on her return, and ever after, was called *Mrs. B.* Surely that would be *evidence* of *identity*." All this would certainly be *presumptive evidence*.

In *Rigg* v. *Curgenven*, 2 Wilson R., 399, the court, in referring to the case of *Morris* v. *Miller*, say, to be sure a defendant's saying in jest that he had laid with the plaintiff's wife, would not be sufficient alone to convict him in a case of criminal conduct; but if it were found that the defendant had seriously or solemnly *recognized that he knew the woman he had laid with was the plaintiff's wife*, we think it would be evidence proper to be left to a jury, *without proving the marriage*. (This was two years after the case of *Morris* v. *Miller*.)

II. The instructions to the jury were correct, and those requested properly refused.

If the proof of the marriage was rightfully admitted, arising from the confessions and acts of the defendant, its sufficiency to satisfy the jury of the fact, must be left wholly with them, as it was, in the charge of the judge.

III. The instructions that if the person with whom the adultery was alleged to be committed was as well known by the name of Vesta Brown as Vesta A. Brown, they would be warranted in finding that the offence, if committed, was committed with Vesta Brown, was also correct.

This was a question of identity, and must be proved. The testimony showed that she was known by different names. The jury found that she was known as well by the one, as the other name.

State v. *Grawl*, 22 Maine R., 171. In this case the property stolen was alleged to be that of E. Emerson, when in fact his father of the same name resided in the same town, and the property was owned by the son, who wrote his name E. Emerson, Jr. It was held that junior was no part of the name, and that the *ownership* was sufficiently proved.

Rex v. *Peace*, 3 B. & A., 579. This was an indictment for assault and battery, on Elizabeth Edwards. It appeared that there were two of the same name, mother and daughter. The assault was committed on the daughter. The objection was taken that there was a misdescription, but overruled. The court say, the question is not whether the party assaulted has been rightly described, but *who the party is*, who is described in the indictment as having been assaulted. Here that has been sufficiently proved. *Franklin* v. *Palmage*, 5 Johns. R., 84; *Kincaid* v. *Howe*, 10 Mass. R., 205; *State* v. *Homer*, 40 Maine R., 431; *Com.* v. *Tompson*, 2 Met. R., 551.

It is not necessary to state the name of the woman, the plaintiff being a married man.

APPLETON, J. This was an indictment for adultery. To prove the marriage the prosecuting officer introduced several witnesses, who testified that they "had heard the defendant say he had a wife and family, and that he had sent for them;" that after their arrival "he introduced Mrs. Libby as his wife, or as Mrs. Libby;" "that they occupied one bed-chamber;" "that he had three daughters;" and in one case he said he "wanted board for his wife and youngest child;" that "he boarded at the house of the witness with his supposed wife and child;" and that he usually called the person whom he introduced as his wife or Mrs. Libby, by her christian name. This evidence was objected to, and

after being received, the counsel for the accused requested the court to instruct the jury that it was insufficient to prove the fact of marriage.

The request of the counsel was denied, and the court instructed the jury that "if from all the testimony in the case introduced for the purpose of proving the marriage of the defendant, they were satisfied beyond a reasonable doubt that he was legally married, and his wife to whom he was legally married was living at the time of the crime alleged to have been committed, they were authorized to find the fact of marriage."

The instruction given was clearly correct, and the evidence to which objections were taken, was properly admissible. If confessions are admissible to prove the commission of a crime, they are equally so to prove a portion of the facts which enter into and constitute the crime. If they are admissible to prove sexual intercourse—a fact essential to sustain the charge, they must be to prove the marriage. It would be absurd to admit a confession of sexual intercourse, and refuse the confession of a marriage, without proof of which, the offence would be differently classified, though belonging to the same general description of delinquency.

Accordingly it was held in *Damon's Case*, 6 Greenl. R., 148, that proof by witnesses who saw the marriage is *prima facie* sufficient, on an indictment for bigamy. In *Cayford's Case*, 7 Greenl. R., 57, this court decided that the prisoner's confession of the marriage, if it took place in another state, was sufficient, and gave a strong intimation that such evidence might be received, if the marriage was in this state. In *Ham's Case*, 11 Maine R., 391, the same question arose in the case of a domestic marriage, and it was determined that the marriage to be proved, wherever solemnized, might be shown by the confessions of the prisoner, deliberately and voluntarily made.

This question again arose in *State* v. *Hodgkins*, 19 Maine R., 155, and it was there held that a marriage in fact, as distinguishable from one inferable from circumstances, must be

proved; but the principle of law, that the confession of an adulterer of his marriage, deliberately and understandingly made, is receivable in evidence, was not denied, much less overruled. But the confessions once made, and under circumstances which render them admissible, it is for the jury to determine the just degree of confidence which they may place in them. The weight to be given to the testimony is especially for their consideration.

It was held in *State* v. *Winkley*, 14 N. H. R., 481, that a marriage in fact must be proved, and that it might be proved by any one present. But if provable by any one present, it is not readily perceived why the confessions of the person married are not equally satisfactory proof of the fact, in proceedings against him. *Habes reum confidentem.*

It is urged that the confessions may have been improvidently made, and that the prisoner, not married, may yet have confessed to a marriage. If so, still the possibility of the untruth of confessions, affords no reason for their exclusion. Such possibility would exclude all proof of this nature. If so, the defendant has little cause of complaint, as he is convicted because the jury placed too much reliance upon statements made by him.

Any regrets which naturally arise from the contingent though possible infliction of a misplaced punishment, will be somewhat lessened by the fact, that if the woman introduced by the defendant as his wife, and with whom he had lived as such for years, and by whom he had become the father of children, whom he recognized as his own, was not in fact his wife, that she was a competent, though she may be reasonably supposed to be a reluctant witness, by whom he could have disproved the *prima facie* case made out against him by his confessions.

No evidence of reputation appears to have been offered. The confessions of the defendant and his acts corresponding to those confessions, were properly received in evidence.

The instruction, that if the person with whom the adultery was alleged to be committed was as well known by the name

of Vesta Brown as by that of Vesta A. Brown, they would be warranted in finding that the offence, if committed, was committed with Vesta Brown, was correct. By the testimony, it appeared that she was known by different names. The jury found she was as well known by one as by the other name.

Exceptions overruled.

TENNEY, C. J., CUTTING and HATHAWAY, J. J., concurred; RICE and GOODENOW, J. J., concurred in the result.

COUNTY OF PENOBSCOT.

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LINCOLN GETCHELL *versus* ARCHIBALD L. BOYD ET AL.

In case of a dilatory plea, the court will not show it favor by giving the defendant leave to amend, and any defect, though in form only, is fatal on general demurrer.

It is not necessary to demur specially for a formal defect in a plea in abatement. Pleas in abatement should be certain and pleaded without any inconsistency.

This action came up on a plea in abatement, seasonably and duly filed at the return term, by the defendants, to quash the plaintiff's writ, for want of due and legal service on them, as they say, to which the plaintiff demurred, and the defendants joined in demurrer.

The officer's return on said writ, so far as relates to the service on the defendants, is as follows: "On this 22nd day of December, 1857, I summoned the defendants, by giving each of the within named defendants a true and attested copy of this writ in hand for their appearance at court."

APPLETON, J., presiding, overruled the plea in abatement, and ruled that the above return, signed by the officer, constituted a good and legal service on the defendants, and that the defendants answer over. To which ruling the defendants excepted.

Plea in Abatement.—And the *said Boyds*, the *said principal* defendants, by A. L. Simpson, Esq., their attorney, comes and defends, &c., where, &c., and prays judgment of the writ aforesaid, and says the same ought to abate, because e says that although his estate and property have been attached by virtue of the said writ, yet by the return thereof it does not appear that said writ was *read to the said defendants, or either of them, or a copy of it left at the last and*

usual place of abode, as is provided by law, and as the statute directs. Wherefore they pray judgment of the same writ, that it may be quashed, and for their costs.

A. C. Smith, counsel for the plaintiff.

A. L. Simpson, counsel for the defendants.

APPLETON, J. The plea in abatement, which was seasonably filed, alleges the service on the defendants to be defective, by reason of a failure to comply with the requirements of the R. S., ch. 119, s. 3. To this there is a general demurrer and joinder in demurrer. The presiding judge sustained the demurrer, and ordered the defendants to answer over, to which exceptions were alleged.

A plea in abatement ought to be pleaded strictly and with precise exactness. 1 Peters' Abr., 49. The greatest precision and certainty possible is required in these pleas. 2 Williams Saund., 209, b. n. It is not enough that the plea contain matter in abatement; it must be pleaded in precise technical form. *Haywood* v. *Chesterry*, 12 Wend. R., 495.

Any defect, though in form only, is fatal on general demurrer. *Clarke* v. *Brown*, 6 N. H. R., 435. It is not necessary to demur specially for a formal defect, in a plea in abatement. *Esdaile* v. *Lund*, 12 Mees. & Wels. R., 606. Nor is it amendable. *Trinda* v. *Durand*, 5 Wend. R., 73. In case of a dilatory plea, says Parke B., in *Esdaile* v. *Lund*, 12 Mees. & Wels. R., 606, "the court cannot show it any favor, and will not give the defendant leave to amend."

The plea commences, "and the said Boyds, the principal defendants, &c., &c., and prays judgment of the writ aforesaid, and says the same ought to abate, because *he says* that although *his* estate and property have been attached by virtue of the said writ, yet by the *return thereof* it does not appear that said writ was read to the said defendants, or either of them, or a copy left at *the last and usual place* of abode, as is provided by law," &c.

In a part of the plea reference is made to only *one* of the

defendants, and to which it does not appear. Nor does the averment negative the fact that a copy was left at the last and usua lace of abode of each of these defendants. Whose last and usual abode is referred to in the plea is not a matter of certainty but of inference. It may have been intended to refer to the last and usual place of abode of the defendant, who, in the singular number, sustains a portion of the burthen of the plea, or it may have referred to that of both defendants, or of their attorney, or of the trustees. The language is extremely vague and inaccurate.

Pleas in abatement "should be certain to every intent, and be pleaded without any repugnancy." 1 Chitty on Pl., (9th Am. ed.,) 457. When a party resorts to the technicalities of the law, he must take special care that he omits none. "Let him who objects to informality in the proceedings of his opponents," remarks RICHARDSON, C. J., in *Clarke* v. *Brown*, 6 N. H. R., 435, "be himself correct in form." Neither in such case is the scriptural injunction inapplicable — "Wherefore let him that thinketh he standeth take heed lest he fall."

The plea in abatement is fatally defective.

Exceptions overruled.

TENNEY, C. J., RICE, HATHAWAY, CUTTING, and GOODENOW, J. J., concurred.

JOSEPH H. PERKINS, *Adm'r, versus* ABIEL CUSHMAN ET AL.

The proof should show the existence of a note corresponding to the one set forth in the declaration, or there will be a fatal variance.

In a declaration upon a note which is lost and cannot be produced, it is necessary not only to set out the substance of the whole note, but to prove the same as alleged; and it is not enough to show that a note was once given and payable either on demand or on time.

Vagueness and uncertainty of proof is equally an objection to sustaining a count for money had and received.

Perkins *v.* Cushman.

By the rules of this court the defendant is entitled to a specification of the matters to be proved in support thereof.

This action is ASSUMPSIT upon a note of hand, and is reported for the consideration of the full court, upon the following facts:

It is admitted that the plaintiff is administrator on the estate of Freeman Snyder. No note was offered at the trial, but with a view to show that a note had been given by the defendants to the plaintiff's intestate and lost, the plaintiff proved by a witness that Freeman Snyder left Lee in October, 1854, went to sea, and died on board the John G. Coster, near Sicily, August 15, 1855; that the said Harriet received from one Captain Brown the effects of said Freeman, among which was the paper attached to the deposition, but that no other note or paper was received by her.

The plaintiff called G. S. Bean, who testified that he called on Charles A. Cushman, with the paper annexed to the deposition, some time after Freeman's death. Cushman objected to paying the note; said the note was a forgery; said they had the money, the amount in the note, but this was not their note; that he had paid ten dollars, which he would not have indorsed on the forged note. Both defendants admitted that they had the money, and had not paid it; said the amount corresponded with the note offered, but it was a forgery, and they would not pay it.

The plaintiff offered his own affidavit to show that he had not received any note, except the paper annexed to the deposition, and that he had made inquiries and diligent search for the note, but was unable to find it.

The plaintiff also offered at the trial a bond of indemnity, to be approved by the presiding judge, to hold the defendants harmless from the payment of the note to any other person.

By consent of the parties, the case was withdrawn from the jury, and continued upon report.

A. G. Wakefield, counsel for the plaintiff.

The plaintiff, as administrator, represents the estate of Freeman Snyder, deceased. Personally, he does not know that the defendants gave the deceased a note in his life time. But the defendants acknowledge they owed the deceased for money, and assert that they gave him a note for their indebtedness to him for the money, corresponding with the amount mentioned in the paper offered.

G. S. Bean testifies, "that the defendants said the note presented to them was a forgery; said they had the money, the amount in the note, but this was not their note." Assuming from their statements that a note was given for the money, which they acknowledge they had, we say the note has been lost or destroyed, and think the court cannot fail to arrive at the same conclusion.

The administrator has used all diligence to find the lost note. Exertions for finding the note are exhausted. It would be useless to make further inquiries. It was not among his effects; it is not with the surviving relatives, and it is not within the research of the administrator, and it is altogether improbable that it has been negotiated, and is now held by any person.

We are not required to prove a positive loss or destruction of the note; a strong probability of the loss of an instrument is sufficient. *Bouldin* v. *Mussie*, 7 Wheat. R., 122.

It is sufficient if the party has done all that could reasonably be expected of him, under the circumstances of the case, in searching for the instrument. *Kelsey* v. *Haumer*, 18 Conn. R., 311.

Were the plaintiff the payee of the note, his affidavit would be sufficient to prove the loss. Greenl. Ev., vol. 2, s. 17.

In *Page* v. *Page*, 15 Pick. R., 368, the court ruled that the affidavits of the executors, who were the plaintiffs, were sufficient presumptive evidence of the loss of the note, to let in evidence of its contents. In this case no evidence of loss was offered, except the affidavits of the executors. By

an examination of the case, the court will see that they had not used the diligence to find the note, that the administrator has in the case under consideration.

Here the administrator not only offers his own affidavit, but the depositions of the surviving relatives, to prove the loss. Greenl. Ev., vol. 1, s. 558, and note.

Assuming that the loss of the note is satisfactorily proved, to let in evidence of the contents of the note, the plaintiff is entitled to recover.

The defendants both acknowledge that they had the money. They say, and we acknowledge, that since the death of Snyder they have paid the surviving sister ten dollars.

They say they gave a note. Of that note we have no knowledge. They did not say and do not say, the note was negotiable. There is not a particle of evidence that it was. The burden of proof is on the defendants, to show the note was negotiable. This they have failed to do, and the court are not to presume it. It must be proved, like any other fact. Having failed to do this, they are liable in this action, by the uniform decisions and authorities, and we are not required to give an indemnifying bond. Greenl. Ev., vol. 2, s. 156, and notes; Byles on Bills of Exchange, p. 428, and note.

If the note were negotiable, the plaintiff is entitled to recover, on filing a satisfactory bond to hold the defendants harmless. *Page* v. *Page*, 15 Pick. R., 368; *Fales* v. *Russell*, 16 Pick. R., 315.

I am aware that the decisions are not uniform on this point, and the case of *Torrey* v. *Foss*, 40 Maine R., 74, seems to be somewhat at variance with the above decisions, or rather the dicta seem to be. Some of the dicta seem also to be in favor of these decisions.

Of course, the only point that could be decided in that case, was that an action could be maintained on a lost note, when at the *time of the judgment* the defendant was protect-

ed by the statute of limitations, though *he was not at the time* of the *commencement* of the action.

The note of the defendants is not yet barred by the statute, but a bond of indemnity has been tendered the defendants, approved by the court, and accepted as sufficient by the defendants' attorney, and he now has it. This fulfills all the conditions that a court of chancery could impose on the plaintiff, in order that he might recover. The court could not improve the defendants' condition by sending this case to a court of chancery. He would have precisely the same security he now has, and no more, and would have no more protection in other respects.

But if the court are not satisfied that we are *now* entitled to recover, a continuance of the action can be ordered, and judgment delayed till the note is barred by the statute.

In *Fales* v. *Russell*, 16 Pick. R., 315, the court say, "it cannot admit of any reasonable doubt, that this (the continuance) would be within the power of the court, and cases may be imagined in which this would be a proper remedy."

A. W. Paine, counsel for the defendants.

Whether an action at *law* can be maintained in this state upon a lost note, is (it seems) still a matter of grave doubt, especially under the circumstances of this case. The note alleged to be lost here was given in October 13, 1854, soon after which the payee went on a voyage to sea, up the Mediterranean, and there died near the island of Sicily. The probabilities are very much against his having taken the note with him, but he would more naturally, as he probably did, leave the note behind, and still more probable have sold it before leaving. For some reason he took a copy of it with him, and that copy was found after his death among his effects, and sent home to his friends.

The first question under this state of things is:

1. Whether an action at law can be maintained for the note? The able opinion of the Chief Justice of this court,

in *Torrey* v. *Foss*, 40 Maine R., 74, does not decide the point, but leaves a case like this altogether uncertain. On the contrary, the remarks of the court, on p. 85, where they give the doctrine deducable from the cases in England and New York, as well as Massachusetts and Maine, limit the right of action to cases where "the note has been lost after it is indorsed, if the defendant is not exposed to pay a second time," &c. The court further remark in the next sentence, that a "*court of equity is the only jurisdiction in such a case which can afford security to the defendant, and allow the plaintiff to recover.*"

The remark of Lord Eldon, as quoted on p. 86, that "he could not understand by what authority courts of law compelled parties to take the indemnity," makes a suggestion certainly worthy of grave consideration, before its heeding is disregarded.

On this point, however, the court having so thoroughly discussed the point in the opinion cited, it is felt that nothing further need be added by the counsel.

2. A second question arises whether here there is such proof of loss as will let in the party to recover, under the circumstances, even though my first point be overruled.

The administrator's affidavit can certainly be good for nothing. He is not placed in circumstances to give his affidavit any force. He lives in Maine, while his intestate lies "deep in the dark green sea," having died more than four thousand miles off. All he can say is, that he has not got it, and so can your honors or any bystander.

And the testimony of the depositions is merely that the defendants did not find the note among the old clothes and trinkets, which were sent home from his Mediterranean burial place.

All this testimony falls very much short of the proof of loss made in the case cited, and certainly so from that certainty which the party is entitled to, when called upon to pay an unproduced note.

3. As to the indemnity. It should be given *before suit.*

This was not given until after trial. A plaintiff should not thus harrass a defendant, and at the end of a long and expensive law suit, saddle all the costs upon the party, by making out for the first time a good cause of action, after the trial is had.

4. As matter of form, the action is incorrectly brought, as it should declare on the note as a lost note, and *proffer* the indemnity. The record should be such as would show the identity of the note, and give the reason of its absence from the files and its non-production in court.

5. The money count will not help the plaintiff, wherein his other counts fail. He cannot prove his loan under it, because the loan was paid by his note given for it. The note, if produced, would support it, but when lost, we think it will not.

6. If judgment is rendered for the plaintiff, the ten dollars paid should be allowed. It was paid to the beneficiary of the estate, who was entitled to recover it.

APPLETON, J. The declaration contains two counts: one on a note dated October 1, 1854, for $53,33, payable to Freeman Synder, in eight months, and the other for money had and received.

At the trial no note was produced, and the plaintiff claimed to recover on a lost note.

The declaration describes the note, for the non payment of which, if of any note, a judgment must be rendered. The proof should show the existence of a note corresponding to the one set forth in the declaration, else there will be a variance. But the evidence entirely fails to give any satisfactory description of the note alleged to have been given. It does not appear what was its date, whether payable to Freeman Snyder or to his order, whether on demand or on time, and whether with or without interest. In a declaration upon a bond which is lost and cannot be produced, it is necessary not only to set out the substance of the whole condition of the bond, but also to prove the same as alleged. *Stickney* v.

Stickney, 1 Foster's R., 61; *Rand* v. *Rand*, 4 N. H. R., 267. The same principle is equally applicable to lost notes.

The vagueness and indefiniteness of proof is equally an objection to sustaining the count for money had and received. It is not enough to show that a note was some time given, and payable either on demand or time. By the 11th rules of court, 37 Maine R., 571, the defendant is entitled to "a specification of the matters to be proved in support thereof." This, the plaintiff has not given.

The plaintiff is equally unfortunate in his proof of the loss of *a note*. His intestate, the payee of the note, Freeman Snyder, died at sea, off the island of Sicily, August 15, 1855. The plaintiff makes oath that he finds no note among the effects of the intestate, which have come into his hand, but that he finds a note purporting to be signed by the defendant, which is conceded not to be genuine, and which does not even purport to be a copy. For aught appearing, the note given to the plaintiff's intestate, may now be in existence in the hands of an assignee or indorsee.

The plaintiff failing to show both the existence and the loss of the note set forth in his declaration, must become nonsuit.

SAMUEL E. CROCKER *versus* ELIPHAZ GULLIFER ET AL.

If a bailee uses property bailed in a different manner than by the contract of bailment he stipulated to use it, such use constitutes a conversion, and trover is maintainable therefor.

Where the agreement was, that the thing bailed should be used in the service of A., and in his business, the bailee has no right to lease the property to B., to be used by him.

Where the option is with the party receiving, to pay for or return the goods received, such alternative agreement amounts to a sale; but otherwise, if, at the time of receiving, he admits the title to be in the other party, so to remain until fully paid for.

Crocker *v.* Gullifer.

Where a sale is conditional—that no title shall pass till the vendee shall pay the price of the article sold and delivered, the vender if guilty of no laches, may reclaim the property, even from a vendee in good faith, and without further notice.

This is an action of TROVER, and is REPORTED by CUTTING, J., presiding at *Nisi Prius*.

The facts of the case fully appear in the opinion of the court.

C. P. Brown, counsel for the plaintiff.

J. A. Peters, counsel for the defendant.

APPLETON, J. On the 9th of November, 1855, the plaintiff agreed with the defendants, that Richard Moors and two other good teamsters should go into the woods, with sixteen horses belonging to the plaintiff, but then in the possession of Moors, and work for the defendants during the coming lumbering season, on certain terms and conditions specified in the contracts between the parties. The defendants being unable to lumber, as they had intended, and consequently having no use for the horses, leased the same to Fiske & Dale, to be by them employed in lumbering, for the same period of time in which they were entitled to their use. The horses continued in the service of Fiske & Dale until they were accidentally burnt, without neglect or fault on the part of any one, and this action is brought for their loss.

The plaintiff had the May previous contracted to sell the horses in dispute to the Richard Moors named in his contract with the defendants, who, when he received them into his possession, gave back a receipt, in and by which he admitted the title to the horses to be in the plaintiff, and further stipulated that they were to continue to be his property "until he is fully paid for them, both principal and interest," and after promising to employ them in his service, in hauling slate during the ensuing hauling season, he agreed at the

end of the same, "to pay said Crocker for said horses or deliver them to him."

To the maintenance of this action, which is trover for the conversion by the defendants, in leasing the property to Fiske & Dale, without authority, the counsel for the defendants interpose various grounds of defence.

1. As the plaintiff is bailer and the defendant is bailee, it is insisted that the action should have been assumpsit upon the written contract between the parties.

Though an action of assumpsit might have been successfully maintained, still it does not follow that the present form of action is misconceived. No principle of law is better settled, than if the bailee uses the property bailed for purposes variant from those for which, by the contract of bailment, they were to be used, that this constitutes a conversion, and that trover is maintainable therefor. As for instance, if one hires a horse to ride to Hampden, and goes beyond that place, or in an opposite direction, he would be liable in trover. *Wheelock* v. *Wheelwright*, 5 Mass. R., 104. So if the stipulation be that the thing bailed is to be employed in the service of A, and in his business, the bailee would have no right to lease the property to another, to be by him used. The bailer intrusts his property to the care and custody of the person with whom he contracts for its hire, but he confers upon him no general right of disposing of its use or enjoyment as he may see fit.

2. As the contract between the plaintiff and Moors is in the alternative to pay for the horses or return the same, it is urged that this constitutes a sale to Moors, and vests the title to the horses in him.

The general proposition, that a delivery of an article at a fixed price, to be paid for or returned, constitutes a sale, is not questioned. When the option is with the party receiving, to pay for or return the goods received, the uniform current of authorities is, that such alternative agreement is a sale.

But in the present case, there are other elements which

modify and control the general principle. Moors not merely agreed to pay for or return the horses, but at the very instant of the bailment, he admitted the title to the same to be in the plaintiff, and agreed that they should continue to be his until they should be fully paid for. It is obvious that Moors could not contest the plaintiff's title, and these defendants are certainly in no better condition.

This case is most clearly distinguishable from those which have been cited as bearing upon this point. In *Holbrook* v. *Armstrong*, 1 Fairf. R., 31, there was a parol agreement to pay for the property in dispute, or return the same at the end of two years, but it was no part of the contract that the title should be and remain in the plaintiff during that period. In *Dearborn* v. *Turner*, 16 Maine R., 17, it was held that Nason, who received the property, "having the alternative to return or pay, the property passed to him, and he was at liberty to sell;" but in that case the plaintiff had not reserved the title in himself till payment. In *Baswell* v. *Bicknall*, 17 Maine R., 344, the party receiving the article in dispute verbally agreed to pay a certain price therefor, or to return the same in a given time. "The property," remarked WESTON, C. J., "in the thing delivered passes, and the remedy of the former owner rests in contract. It is the option conceded to the party receiving which produces this effect." But the option in the present case was qualified by the special agreement that the title was to remain in the plaintiff till payment. In *Perkins* v. *Douglas*, 20 Maine R., 317, the written promise was, to return the chattel or to pay therefor, and nothing more. "Such a contract," says SHEPLEY, J., "does not reserve to the seller any right in the property for the security of the purchase money." But here that right was reserved in most clear and explicit terms. In *Southwick* v. *Smith*, 29 Maine R., 228, there were notes given for the hides, and a further agreement to return the leather made from the same, if the notes should not be paid at maturity, and the proceeds to be applied to their payment, but no language is found in the contract by which the plain-

tiff reserved any ownership in the property delivered; if there had been, the decision would have been otherwise.

3. The plaintiff had the right of immediate possession for the summer, which is the season for hauling slate. His contract with the defendants described them as his, but in the possession of his servant. The sale being conditional—that no title shall pass till the vendee shall pay the price of the article sold and delivered, the vender, if guilty of no laches, may reclaim the property, even from a vendee, in good faith, and without notice. *Coggell* v. *New Haven Railroad Company*, 3 Gray R., 545. The chattel in such case is in the constructive possession of the seller, and an action may be maintained without a demand, in case of a conversion by the purchaser. *Hill* v. *Freeman*, 3 Cush. R., 257.

4. Moors had no authority to lease, either express or implied; and that the defendants so regarded it, is apparent from their telegraphic dispatch requesting leave to lease the horses to Fiske & Dale.

5. The defendants hired the horses to be used in their employ, and they had no right to transfer their control and use. The contract was specific—to be used by them.

The evidence offered was immaterial. The liability of the defendants arose when, by their consent, Fiske & Dale assumed the control of the horses leased to them. That act was a conversion, if the plaintiff deemed it expedient so to regard it. Whether they were afterwards lost by carelessness or not, is an inquiry of no concern to the plaintiff. The risk was henceforth on the defendants.

Defendants defaulted.

TENNEY, C. J., RICE, HATHAWAY, CUTTING and GOODENOW, J. J., concurred.

ANSEL T. SYLVESTER *versus* WINSLOW STAPLES.

The liability of an accepter of a bill of exchange arises from and is limited by the terms of his acceptance, and as the language of such acceptance is his own, it is to be taken most strongly against him.

By his acceptance, the drawee, as between him and the payee, is to be regarded as the maker of a promissory note running to the payee.

The meaning of a written contract is to be ascertained from its terms, and parol evidence is not admissible to vary, alter or control the meaning of an acceptance, when the language used is intelligible.

This action, REPORTED by APPLETON, J., is ASSUMPSIT on the following order:

"W. STAPLES, ESQ.,—*Dear Sir:* Please pay Ansel T. Sylvester fifty-five dollars, for work done on logs, and yours oblige. Signed, L. B. RICKER & Co."

On this order is the following memorandum in writing:

"I accept the written order, to pay when due.

WINSLOW STAPLES."

The defendant offered to prove by parol, that when this order was accepted, as above, the parties thereto agreed that the drawee should accept to pay when in funds, and that Sylvester and Staples each understood and intended the language used in the acceptance as meaning, that Staples should pay when the amount was due from him to the drawers; that at the time of said acceptance there was nothing due from Staples to the drawers of said order, nor has there been at any time since. This testimony was excluded by the presiding judge, and he ruled that the words on the order purporting to be an acceptance thereof, signed by the defendant, constituted an acceptance of the order, unconditional, "to be paid at maturity." That the words "when due" signified when the order was due, and not when the amount was due from the drawers to the accepter.

A. L. Simpson, counsel for the plaintiff.

The plaintiff in this action claims the right to recover of the defendant the sum of $55.00, on an order drawn by L. B. Ricker & Co., on the defendant, June 1st, 1857, in his favor, and accepted by the said defendant the same day.

The questions raised, are as to the construction of that acceptance, and the right of the defendant to introduce parol evidence of what the agreement of the parties was at the time the defendant accepted the same, which acceptance is in these words: "I accept the within order, to pay when due," and signed by the defendant.

Is there any ambiguity in the language of the acceptance?

The order was drawn on the defendant, presented to him, and he accepted it, to pay when due.

The order does not purport to be on time, nor on demand; it may therefore be regarded as an order payable at sight, and then the defendant would have been entitled to three days' grace, and then the order would not have been due till the end of the days of grace.

The statute provides that whenever any promissory note, inland bill of exchange, draft, or *order* for the payment of money, payable at a future day or at sight, *and not on demand*, that the maker or accepter *shall* be entitled to three days' grace. R. S., 1840, ch. 44, s. 13. This order does not purport to be on time *or on demand*, and that would entitle the defendant to his three days of grace.

A patent ambiguity cannot be aided by parol evidence. Greenl. Ev., ss. 298, 299, 300, 301, and note.

The prior and contemporaneous conversations, agreements and acts of the parties are not admissible to explain, vary or control the meaning of the acceptance; that must be ascertained from the inspection of the instrument itself.

The principle that when there is no ambiguity in the terms used, the agreement or instrument itself shall be the *only* criterion of the intentions of the parties, excludes parol testimony contradictory to the writing itself, although such oral testimony would clearly show that the real intentions

of the parties were at variance with the particular expressions of the written agreement. Chitty on Con., 6th Am. ed., p. 99; see also pp. 110 and 102.

The inquiry to be made by the court is, what intentions do the words of the instrument express, *without regard to any intentions of the parties, independent of the words used?* Phillips' Ev., 3d ed., part 2d, p. 571, note 286; also Greenl. Ev., s. 275, 276, 277.

You cannot control the legal effect of an accepted bill, by showing a contemporaneous verbal agreement, that it was to be paid out of a particular fund. *Campbell* v. *Hodgdon*, Gow. R., 74.

When once a written contract is made and executed and delivered as such, it is not admissible by law to look for any of its terms *aliunde*. They can be proved only by the instrument itself. *Goodwin* v. *Curtis*, 11 Maine R., 440; *Haywood* v. *Perrin*, 10 Pick. R., 230; *Allen* v. *Kingsbury*, 6 Pick. R., 235; *Marshall* v. *Baker*, 19 Maine R. 402.

Parol evidence cannot be received to vary the legal effect of an indorsement in blank upon a bill or note. *Crocker* v. *Getchell*, 23 Maine R., 392.

Whatever may have been the previous conversations between the parties, or *even their understanding of what was agreed upon between them*, * * * yet if the parties finally proceed deliberately and fairly to put their agreement in writing, *nothing is better understood than that the writing is conclusive upon them, and all the previous conversations and understandings in reference to the subject are inadmissible* to control the import of the writing. *McLellan* v. *Cumberland Bank*, 24 Maine R., 568, 569.

Parol evidence that a bill of exchange, absolute in its terms, was to be payable on a contingency, is inadmissible. *Cunningham* v. *Wardwell*, 12 Maine R., 466. This case and *Stackpole* v. *Arnold*, 11 Mass. R., 27, are leading cases upon the point at issue, and in them the ruling of the court in the case at bar is fully sustained.

It is a well settled principle of law, that all written agree-

ments are to be construed most strongly against t e maker. There is no latent ambiguity in the instrument, and none is offered to be proved. If there was a latent ambiguity in the instrument, then it would be necessary to prove it by testimony *aliunde*. It could not be ascertained by inspection of the instrument, for if it appeared on inspection of the instrument, it would not be latent but patent, and then all parol testimony is excluded, and the meaning and intention of the parties must be ascertained from the instrument itself.

The defendant not offering any testimony to prove a latent ambiguity, and there being none in the instrument, the ruling of the court must be regarded as correct, and the testimony which was offered and excluded, being offered to prove an agreement and understanding different from the legal import of the instrument, must be regarded as rightly excluded, and therefore it becomes the duty of the court to order a default to be entered.

G. P. Sewall, counsel for the defendant.

The plaintiff in this suit seeks to hold the defendant to pay a certain order, in consequence of an acceptance, "to be paid when due," and the question really raised is, w at did the defendant intend by the words, "to be paid when due?"

We assume this to be a conditional acceptance, to be paid by the defendant when the amount of the order was due from the drawee to the drawer, and is equivalent to an acceptance to be paid when in funds.

The order was drawn against a certain fund arising from the sale by the drawer to the drawee, of certain logs mentioned on its face. The court will perceive the order was not payable on any specified day.

It was therefore made payable on demand, and if the position of the plaintiff is correct, when accepted, it was payable forthwith. The parties are presumed to have understood the effect of their contract. If, therefore, it was payable forthwith, what significance has the agreement to pay when due? If time or delay was intended, would not the defend-

ant have accepted, to be paid on some day thence to come? This was evidently a part of a lumbering transaction. The defendant had purchased of the drawer certain logs. Now it is usual, and in fact there are no exceptions to the rule, to hold a lien upon logs, on the river where this transaction took place. All logs, from necessity, pass through the Penobscot boom, or through the boom of one of the log driving companies.

There is a lien for stumpage; a lien to the man that cuts, to the man who draws, to the man that drives in the river, to the log driving company who drives the river, to the dams over which the log floats, and to the boom that stops them before manufactured.

The drawee having purchased these logs, is it reasonable to suppose, as a prudent man, he would incur further liabilities for his vendor, until the claims against them, that might have defeated his title, were all stated, and the amount due the drawer ascertained? He accepted in the usual form in lumbering transactions, when the drawee intends paying out of a given fund, if it ever accrues, although perhaps the custom is not sufficiently general to render it binding as such on the parties.

It is not assumed that parol testimony is admissible to explain the acceptance, unless it contains a latent ambiguity. But if the intention of the parties cannot be gathered from the paper, then it is admissible. 14 Maine R., 233; 9 Cushing R., 104.

APPLETON, J. The liability of the accepter of a bill of exchange arises from and is limited by the terms of his acceptance. As the language of such acceptance is his own, it is to be taken most strongly against him.

The drawee, by his acceptance, promises the payee, who may bring a suit thereon against him. As between them, he is to be regarded as the maker of a promissory note, running to the payee. The defendant then, by his acceptance, promised the plaintiff to pay him for work done on certain logs

of a particular mark, *when due*. The payment was to be for work done, and it was to be made when, by the agreement between the drawer and the payee, the same might be due. The acceptance was absolute, except as to the time of payment.

The evidence offered was properly rejected. The meaning of a written contract is to be ascertained from its terms. Parol evidence is not admissible to vary, alter or control the meaning of an acceptance, when the language used is intelligible. "No rule of law is better established," says DALLAS, C. J., in *Campbell* v. *Hodgson*, 1 Gow. R., 74, "than that a party shall not be permitted to add a verbal or oral condition, in order to control the legal effect of a written instrument."

As the time when payment for the work done should, according to the agreement of the parties, have been made, does not distinctly appear, the cause must stand for trial.

TENNEY, C. J., RICE, HATHAWAY, CUTTING and GOODENOW, J. J., concurred.

COUNTY OF WASHINGTON.

JOHN S. GILMAN *versus* DANIEL CUNNINGHAM.

It is no part of the duty of the full court to audit or adjust accounts, or determine the balance due.

When the principles upon which the rights of parties depend are established, the cause should be remanded to the county court where the action is pending.

Under an agreement that the court determine for what sum judgment may be entered, the amount due should be ascertained by the presiding justice, or an auditor appointed by the court.

This was an action of ASSUMPSIT, and at the January term of this court in 1856, it was submitted to the full court upon an agreed statement of facts, and after agreement by the counsel of both parties, judgment was rendered for the plaintiff as follows: Defendant defaulted. Parties to be heard in damages.

And at the next term of the court, the plaintiff submitted a motion for assessment of damages by the court, upon the evidence contained in the agreed statement. This motion the court overruled, DAVIS, J., presiding. To this ruling and refusal to assess damages the plaintiff excepted.

F. A. Pike, counsel for the plaintiff.

George W. Dyer, counsel for the defendant.

APPLETON, J. The conclusion of the report, when this cause was submitted to the court, was that "the court are to determine for what sum judgment may be entered." After examining the facts and applying the law thereto, the court ordered the entry of a default, and that the parties be heard in damages.

It is now insisted that this court should have determined the damages. But it is no part of the duty of this court to attend to the auditing or adjusting of accounts, or determining the balance due. When the principles of law upon which the rights of the parties are to depend are established, the cause is properly remanded to the county court where the action is pending. The amount due is to be ascertained by the justice presiding, or by an auditor appointed by the court, who will assess damages, and in case of any conflict between the parties as to the application of legal principles to the facts as ascertained, will report the facts and the rules of law by which he has been guided, in order that, if erroneous, they may be corrected.

Exceptions sustained.
The parties to be heard in damages.

TENNEY, C. J., CUTTING, HATHAWAY and GOODENOW, J. J., concurred.

APPENDIX.

OPINIONS OF THE JUSTICES

OF THE

SUPREME JUDICIAL COURT,

ON QUESTION PROPOUNDED BY THE SENATE,

MARCH 26, 1857.

STATE OF MAINE.

IN SENATE, March 26, 1857.

Ordered, That the Justices of the Supreme Judicial Court be and they hereby are, required to give their opinions upon the following question:

Are free colored persons, of African descent, having a residence established in some town in this state, for the term of three months next preceding any election, authorized under the provisions of the constitution of this state, to be electors for governor, senators and representatives?

And it is further *Ordered*, That a copy hereof, signed by the President *pro tem.* and attested by the Secretary of the Senate, be communicated forthwith by the most expeditious

mode, to each one of the Justices of the Supreme Judicial Court, and an answer to the foregoing question be requested at the earliest possible moment. But if the legislature shall have adjourned before the answer can be prepared, the same shall be returned to the secretary of state, to be by him published in the state paper.

Read and passed.

HIRAM CHAPMAN, *President pro tem.*

Attest: JOSEPH B. HALL, *Secretary of the Senate.*

OPINION OF THE SUPREME JUDICIAL COURT.

THE undersigned, Justices of the Supreme Judicial Court, respectfully present their opinion in answer to the interrogatory addressed to them by the order of the senate under date of March 26, 1857.

The interrogatory, as propounded, is very comprehensive in its terms, and includes "free colored persons, of African descent, having a residence established in some town in this state, for the term of three months next preceding any election," &c., whether such persons are men, women, children, paupers, persons under guardianship, or unnaturalized foreigners.

Presuming it to have been the intention of the senate to confine the inquiry to free colored male persons of African descent, who are twenty-one years of age and upwards, and who are possessed of the other qualifications requisite to constitute a white citizen a voter, we will proceed to answer.

Article two, section one, of the constitution of Maine, provides that:

"Every male citizen of the United States, of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this state for the term of three months next preceding any election, shall be an elector for governor, senators and representatives in the town or plantation where his residence is so established."

This raises for our consideration the distinct question, whether free native born colored persons, of African descent, are recognized as "citizens of the United States" in the above provision of the constitution.

The political status of that portion of the African race in this country, which is not in a state of slavery, has long been

matter of contestation, not only among politicians, but, to some extent, also among courts and jurists.

Chancellor KENT, in a note to the 257th page of the second volume of his commentaries, (4th edition,) says:

"Citizens, under our constitution and laws, mean free inhabitants born within the United States, or naturalized under the laws of congress. If a slave, born in the United States, be manumitted, or otherwise lawfully discharged from bondage, or if a black man be born within the United States, and born free, he becomes thenceforward a citizen, but under such disabilities as the laws of the states respectively may deem it expedient to prescribe to free persons of color."

This doctrine, though supported by high judicial authority, is by no means universally admitted. Courts and jurists of high respectability and authority, have denied that negroes of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as slaves, are or can become citizens of the United States, within the meaning of the constitution of the United States. This doctrine has recently been maintained with much zeal, and at great length, in the case of *Dred Scott* v. *Sandford*, 20 Howard's U. S. R., 393. Substantially the same doctrines have been promulgated in *Amy* v. *Smith*, 1 Littell's Ken. R., 333; *State* v. *Claiborne*, 1 Meigs' Ten. R., 331; *Pendleton* v. *State*, 1 Eng. Ark. R., 509; *Cooper* v. *the Mayor of Savannah*, 4 Geo. R., 68; and by DAGGETT, C. J., in *State* v. *Crandall*, in Connecticut.

As to the correctness of those decisions, we express no opinion. Each must stand upon its own intrinsic merits, and they will undoubtedly receive that degree of respect to which, as legal productions, they are justly entitled. They do not, however, affect the question now before us.

Our present inquiry is confined to an interpretation of the provision in our own constitution already cited, and the term "citizen of the United States," as used therein.

Article four, section one, of the constitution of the United States, provides that:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Our inquiry, therefore, extends not only to the rights of free colored persons of African descent who were born within this state, but also to the same class of persons who may have been born in other states, but who have become residents of this state.

Chief Justice TANEY, in the opinion of the majority of the court in the case of *Dred Scott* v. *Sandford*, cited above, lays down the following propositions as to citizenship of the United States:

"It is true every person, and every class and description of persons, who were at the time of the adoption of the constitution recognized as citizens in the several states, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several state communities, or who should afterwards, by birthright or otherwise, become members according to the provisions of the constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities, into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his state which he did not before possess, and placed him in every other state upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States."

Rawle, in his Commentaries, says:

"The citizens of each state constituted the citizens of the United States when the constitution was adopted. The rights which appertained to them as citizens of those re-

spective commonwealths, accompanied them in the formation of the great, compound commonwealth which ensued. They became citizens of the latter without ceasing to be citizens of the former, and he who was subsequently born a citizen of a state, became, at the moment of his birth, a citizen of the United States." Rawle on the Const., p. 86.

"Every citizen of a state is, *ipso facto*, a citizen of the United States." Story on the Const., vol. 3, p. 565.

Such being the operation of that provision of the constitution of the United States which we have cited above, upon the condition of those persons who were recognized as citizens of the several states at the adoption of the constitution, it becomes pertinent to our inquiry to ascertain the political condition of the free colored people of African descent in the several states, at that time. Were they then recognized as citizens of any of the states which entered into and composed a part of the United States? Let the constitutions of the states then existing, and the practice under them, answer. The fact of citizenship may be established in various ways. The enjoyment of the elective franchise is believed to be one of the highest tests of that fact. There may be citizenship without the enjoyment of this right, as in the case of women, children, paupers, and the like; but it is believed no instance can be found in which the right to vote at our general elections has been conceded to persons born on our soil, who were not at the time deemed citizens of the states in which they enjoyed the right.

The constitution of the United States was adopted September 17, 1787.

The constitution of New York, adopted April 20, 1777, section seven, provides:

"That every male inhabitant of full age, who shall have personally resided in one of the counties of this state for six months immediately preceding the day of election, shall at such election be entitled to vote for representative in said county in assembly, if during the time aforesaid, he shall have been a freeholder possessing a freehold of the value of

twenty pounds, within said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the state."

By the constitution of New York, adopted in 1821, article eleven, section one, the qualification of electors was to some extent modified; the word "citizen" was substituted for the word "inhabitant," and other modifications made, among which was added the following clause:

"But no man of color, unless he shall have been three years a citizen of this state, and for one year next preceding any election shall be seized and possessed of a freehold estate of the value of two hundred and fifty dollars, over and above all debts and incumbrances charged thereon, and shall have been actually rated, and paid a tax thereon, shall be entitled to vote at any such election."

The old constitution did not contain this provision discriminating against the "man of color."

The constitution of New Jersey, adopted July 2, 1776, section four, provides:

"That all inhabitants of this colony, of full age, who are worth fifty pounds, proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for representatives in council and assembly; and also for all other public officers that shall be elected by the people of the county at large."

In 1844, the constitution of New Jersey was amended, and the elective franchise was restricted to "white male citizens of the United States."

Maryland adopted a constitution in 1776, the second section of which provides that:

"All freemen above twenty-one years of age, having a freehold of fifty acres of land in the county in which they offer to vote, and residing therein, and all freemen having property in this state above the value of thirty pounds, current money, and having resided in the county in which they offer to vote one whole year next preceding the election, shall

have a right of suffrage in the election of delegates for such county."

And by the fourteenth section *all persons* qualified as aforesaid to vote for delegates, were also made electors of senators.

The constitution was so amended in 1801–2 that the right of suffrage was confined to "free white male citizens above twenty-one years of age, and no others."

North Carolina adopted a constitution December 18, 1776. This constitution contains the following provisions:

"SECT. 7. That all freemen of the age of twenty-one years, who have been inhabitants of any one county within the state twelve months immediately preceding the day of any election, and possessed of a freehold within the same county of fifty acres of land, for six months next before, and on the day of election, shall be entitled to vote for a member of the senate.

"SECT. 8. That all freemen of the age of twenty-one years, who have been inhabitants of any county within the state twelve months immediately preceding the day of election, and shall have paid taxes, shall be entitled to vote for members of the house of commons for the county in which he resides.

"SECT. 9. That all persons possessed of a freehold in any town in this state, having a right of representation, and also all freemen who have been inhabitants of any such town twelve months next before, and at the day of election, and shall have paid public taxes, shall be entitled to vote for a member to represent such town in the house of commons."

In 1835, the following amendment was adopted touching the right of suffrage:

"No negro, free mulatto, or free person of mixed blood descended from negro ancestors to the fourth generation inclusive, (though one ancestor of each generation may have been a white person,) shall vote for members of the senate or house of commons."

In the case of *State* v. *Manuel*, decided by the Supreme

Court of North Carolina, in 1838, 2d Dev. & Bat., 20, GASTON, J., in a very elaborate opinion of the court, uses the following language:

"Before our revolution, all free persons born within the dominions of the king of Great Britain, whatever their color or complexion, were native born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity or disqualification of slavery was removed, they became persons, and were then either British subjects or not British subjects, accordingly as they were or were not born within the allegiance of the British king. Upon the revolution, no other change took place in the law of North Carolina than was consequent upon the transition of a colony dependent on an European king, to a free and sovereign state. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the state, continued aliens. Slaves manumitted here become freemen—and therefore, if born within North Carolina, are citizens of North Carolina—and all free persons born within the state are born citizens of the state."

Again, he says:

"That constitution [1776] extended the elective franchise to every freeman who had arrived at the age of twenty-one, and paid a public tax; and it is a matter of universal notoriety that under it free persons, without regard to color, claimed and exercised the franchise until it was taken from free men of color, a few years since, by our amended constitution."

The soundness of the doctrine of this opinion has since been recognized by the same court, in the case of *State* v. *Newsom*, 5 Iredell R., 250.

Section two of chapter one of the constitution of Massachusetts, adopted in March, 1780, reads as follows:

"The senate shall be the first branch of the legislature;

and the senators shall be chosen in the following manner, viz.: there shall be a meeting on the first Monday in April, annually, forever, of the inhabitants of each town in the several counties in this commonwealth, to be called by the selectmen, and warned in due course of law, at least seven days before the first Monday in April, for the purpose of electing persons to be senators and councilors; and at such meetings every male inhabitant of twenty-one years of age and upwards, having a freehold estate, within the commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to give in his vote for the senators for the district of which he is an inhabitant. And to remove all doubts concerning the meaning of the word 'inhabitant,' in this constitution, every person shall be considered an inhabitant, for the purpose of electing and being elected into any office, or place within the state, in that town, district or plantation where he dwelleth, or hath his home."

Slavery has not existed in Massachusetts since the adoption of the constitution, in 1780. *Com.* v. *Aves*, 18 Pick. R., 193. And from that day to the present, those free men of African descent, who possessed the qualifications required of white citizens, have enjoyed the rights of the elective franchise in that state.

The constitutions of other states, adopted before and since the formation of the present federal government, contained provisions equally broad and liberal, with reference to the right of voting, as those from which we have already quoted; while in others of the thirteen states which originally composed the Union, the right of voting in the general elections was confined to "free male white citizens." The same formula of words is also used to limit and define the rights of electors in several of the constitutions of states which have been created and admitted into the Union since the constitution of the United States was adopted, and also in sundry laws passed by congress under the constitution. Whether this form of words does not carry the implication that "citi-

zens" exist who are not *white*, we do not deem it important now to consider; nor do we deem it essential to pursue this branch of our inquiry further at this time.

Such was the condition of things in 1820, when Maine, then constituting a part of the state of Massachusetts, was erected into a new and independent state, and her citizens, after having lived under the constitution of 1780 for a period of forty years, formed the constitution under which we now live. The convention which formed that constitution was composed of our most intelligent and influential citizens. Every important provision in that instrument was closely scrutinized before it was adopted. Nor did the section which prescribed the qualification of electors pass unchallenged. When that section was under consideration, Mr. Vance, of Calais, moved to insert the word "Negroes" after the words "Indians not taxed."

Mr. Holmes said:

"The 'Indians not taxed' were excluded, not on account of their color, but of their political condition. They are under the protection of the state, but they can make and execute their own laws. They have never been considered members of the body politic. But I know of no difference between the rights of the negro and the white man; God Almighty has made none — our declaration of rights has made none. That declares that 'all men' (without regard to colors) 'are born equally free and independent.'"

"Mr. Vance and Dr. Rose spoke in favor of the motion, but it did not obtain." Perley's Debates, p. 95.

From the adoption of the constitution to the present day, it is believed there has been no instance in the state in which the right to vote has been denied to any person resident within the state, on account of his color.

In view of these facts and considerations, we are of the opinion that our constitution does not discriminate between the different races of people which constitute the inhabitants of our state; but that the term, "citizens of the United States," as used in that instrument, applies as well to free

colored persons of African descent as to persons descended from white ancestors. Our answer, therefore, is that:

Free colored male persons, of African descent, of the age of twenty-one years and upwards, having a residence established in some town or plantation in this state three months next preceding any election, and who are not paupers, aliens, nor persons under guardianship, are authorized, under the provisions of the constitution of this state, to be electors for governor, senators and representatives.

JOHN S. TENNEY,
RICHARD D. RICE,
JONAS CUTTING,
SETH MAY,
DANIEL GOODENOW.

OPINION OF JUDGE HATHAWAY.

To the Honorable, the Senate of Maine:

In obedience to the preceding order, I have considered the question proposed to the court, and herewith transmit my opinion, as one of the justices thereof.

By the constitution of Maine, article two, section one:

"Every male citizen of the United States, of the age of twenty-one years and upwards, excepting paupers, persons under guardianship and Indians not taxed, having his residence established in this state, for the term of three months next preceding any election, shall be an elector for governor, senators and representatives, in the town or plantation where his residence is so established."

Hence the answer to the question proposed must depend upon the result of the inquiry, whether or not such "free colored persons of African descent" are "male citizens of the United States, of the age of twenty-one years and upwards," not being paupers or persons under guardianship.

Citizens of the United States are those persons who are native born such, and those children of citizens who, although born abroad, are by law considered as native born—and aliens who have been naturalized under the laws of congress —and those who become such by treaty.

If aliens, free colored persons of African descent cannot, by our laws, become citizens of the United States, for the laws of congress, concerning naturalization, grant that privilege to none but "free white persons"—and congress has exclusive power to legislate upon that subject.

The question, therefore, is merely whether or not such free colored persons are native born male citizens of the United States, or those who have become citizens by treaty stipulations.

In the case of *Dred Scott* v. *J. F. H. Sandford*, the Supreme Court of the United States has recently decided that negroes of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves, were not citizens of the United States.

In answering the question proposed to the court, it is necessary to consider the legal effect of that decision.

By the federal constitution, article one, section two:

"No person shall be a representative who shall not have been seven years a citizen of the United States."

And by article one, section three:

"No person shall be a senator who shall not have been nine years a citizen of the United States."

By article one, section eight:

Congress has power "to establish an uniform rule of naturalization."

And by article four, section two:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

By these last two provisions of the constitution, and the laws of congress, upon the subject of naturalization, passed in pursuance of the power granted—the laws concerning citizenship in the United States, and in each state, were made

entirely uniform; for it is certain, that in the sense in which the word "*citizen*" is used in the federal constitution, "*citizen of each state*," and "*citizen of the United States*," are convertible terms; they mean the same thing; for "the citizens of each state are entitled to all privileges and immunities of citizens in the several states," and "citizens of the United States" are, of course, citizens of *all* the United States.

But it is obvious that the uniformity of the laws concerning what constitutes a citizen of each and all the United States, cannot be authoritatively enforced, and the provisions of the federal constitution and laws upon that subject made effectual, unless there be some ultimate tribunal—some final arbiter, whose decisions upon questions arising under the constitution and laws concerning it, shall be conclusive and binding upon all the states. By the laws of one state it may be provided that if a master come within its limits with his slave, the slave shall become, *ipso facto*, emancipated, and being once free, is always free, and that being native born in the United States, he is a citizen of the state, and therefore "entitled to all privileges and immunities of a citizen in the several states." While by the laws of the state from which he came it may be provided, that if he return there he shall not be entitled to the privileges and immunities of a citizen, but that he shall return to his former servitude. If each state has the power to determine, authoritatively, who are and who are not citizens of the state, and, consequently, who are and who are not citizens of the United States, any one state may effectually resist the laws of all the other states, and of congress, and create citizens of the United States who would be repudiated as such by every other state in the Union. There might be as many different classes of citizens as there are states, all citizens of some one state, and yet utterly powerless to enforce their constitutional rights to "all privileges and immunities of citizens in every other state." If such were the true interpretation of the constitutional powers of the federal government, and of the relations existing between it and the governments of the

several states, and of their constitutional powers, the government of the United States would be imbecile and powerless for the most important purposes for which it was established. Indeed, it could not be, properly, denominated a *government.*

By the federal constitution, article six, section two:

"This constitution and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

And by article three, section two:

"The judicial power shall extend to all cases in law and equity, arising under this constitution and the laws of the United States, [including among many enumerated subjects of jurisdiction] controversies between citizens of different states."

The general government, though limited as to its objects, is supreme with respect to those objects. This principle is part of the constitution, and if there be any who deny its necessity, none can deny its authority.

The necessity of uniformity as well as correctness in expounding the constitution and the laws of the United States, would itself suggest the propriety of vesting, in some single tribunal, the power of deciding in the last resort, all cases in which they are involved.

"The judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered."

[Per Mr. Chief Justice MARSHALL, in *Cohens* v. *Virginia,* 6 Wheaton's United States Reports, 264.]

The Supreme Court of the United States is a tribunal of ultimate jurisdiction; and its judicial power rightfully ex-

tending to cases arising under the constitution and laws, its judgment must become, "*ipso facto*, conclusive between the parties before it, in respect to the points decided," and "the case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature." Story's Commentaries on the Constitution, pages 349, 350. *Natives* are all persons born within the jurisdiction of the United States. If they were resident citizens at the time of the declaration of independence, though born elsewhere, and deliberately yielded to it an express or implied sanction, they became parties to it, and are to be considered as natives—their social tie being coeval with the existence of the nation. 2 Kent's Commentaries, 39, lecture 25. Hence the provision in the federal constitution, article two, section one, that "no person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of President."

It is possible that there may have been colored persons, who came here from Africa *free* men, and who were always free, and that they or their descendants, native and free born, were here at the time of the declaration of independence, and yielded to it their sanction. If so, they were citizens. Their color could not exclude them.

From a careful consideration of the question proposed, I cannot avoid the conclusion that the decision of the Supreme Court of the United States in the case of *Scott* v. *Sandford*, before mentioned, so long as it shall stand as the final judgment of that tribunal, must be held as legally conclusive and binding upon the several states; and it is therefore my opinion, that "free colored persons of African descent, having a residence established in some town in this state for the term of three months next preceding any election," whose ancestors were of African blood, and were brought into this country and sold as negro slaves, not being citizens of the United States, are not authorized under the provisions of the constitution of this state to be electors for governor, senators

and representatives. And it is also my opinion, that all other free colored persons of African descent, if there are any such in this state, who have the qualifications required by law to make free white persons electors for those officers, are authorized under the provisions of the constitution of this state to be electors for governor, senators and representatives.

As I could not concur in the opinion of the majority of the court upon the question presented, it became necessary for me to give my separate opinion, which is respectfully submitted. And I beg leave to refer to the opinion of the Supreme Court of the United States, delivered by Chief Justice MARSHALL, in *Cohens* v. *Virginia*, 6 Wheaton R., 264, and also to Story's Commentaries on the Constitution, vol. 1, book 3, ch. 4, entitled "Who is final judge or interpreter in constitutional controversies," in which authorities there is much valuable learning, and excellent reasoning, concerning the constitutional power of the Supreme Court, and the conclusiveness of its decisions.

JOSHUA W. HATHAWAY.

OPINION OF JUDGE APPLETON.

In pursuance of the requirements of the constitution, I have the honor to answer the inquiry proposed by the honorable senate.

The constitution of this state confers the right of suffrage on "*every male citizen of the United States* of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this state for a term of three months next preceding any election." To determine whether those of African descent, having the other required qualifications, are entitled to vote, it will become necessary to ascertain

what constitutes citizenship, and whether by the constitution of the United States, the native born free man of African descent is, by its provisions, expressly and inexorably prohibited from being or becoming a citizen.

By the constitution of the United States, article four, section two:

"The citizens of *each* state SHALL be entitled to all privileges and immunities of citizens in the several states."

The constitution of Maine recognizes as its fundamental idea, the great principle upon which all popular governments rest—*the equality of all before the law.* It confers citizenship and entire equality of civil and political rights upon all its native born population.

The importance of the inquiry is commensurate with that of American citizenship, and the right of suffrage to those whose rights are in issue. Its magnitude is co-extensive with that of state sovereignty and state rights. It is no less than whether a sovereign state is restricted by the constitution of the United States as to those of its native born population upon whom it may confer the right of citizenship, and whether those, or any portion of those upon whom she has conferred that right, are or are not to be regarded as citizens of the United States. It involves the right of the citizen, and the power of a sovereign state. Its importance demands that it should receive a careful and cautious examination.

The subjects of a state, or the citizens of a commonwealth, are native born or naturalized. Allegiance and protection are reciprocal. If allegiance is due to the state, the state is bound to protect. The right of personal security, personal liberty, and to acquire and enjoy property, are natural and inherent. All members of a civil society, bound by its laws, liable to its penalties, are entitled to its aid in the enforcement of right, and for protection against wrong. They are none the less citizens because, in some respects, they may not have all the privileges granted to the most favored. The Cornish miner burrowing in the earth, the princely no-

bleman in his palatial residence, or the beggar at his gate, are alike members of the same civil community—fellow subjects and fellow citizens. The recipients of public charity, and those from whose means it is furnished, are alike citizens of the state by whose laws the wants of the former are supplied, and the obligation is imposed upon the latter of supplying them. In some of the states there are certain property qualifications, such as owning a certain amount of real estate, or having a prescribed number of slaves, which are required before one can vote, or hold any office, yet those not having the required amount of property are citizens, though from poverty they may, by the constitution of the state in which they reside, be incapacitated from voting, and be ineligible to office. So, too, minors and married women labor under numerous disabilities of person and property. They cannot control or manage their estates; they cannot vote, nor hold office; yet, notwithstanding these disabilities, they are citizens whose interests the government is bound to protect with a care equally sedulous as those upon whom it confers the right of suffrage, and of political station. Were the right of suffrage necessary to constitute citizenship, three-fourths of the free people of the country would, by reason of age, sex, or the poverty of their condition, be disfranchised.

"It is an established maxim," says Mr. Madison, "that birth is a criterion of allegiance. Birth, however, derives its force, sometimes from place, and sometimes from parentage; but in general, place is the most certain criterion; it is what applies in the United States."

"Two things," says STORY, J., in *Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Pet. R., 155, "usually concur to create citizenship—first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the allegiance of the sovereign. That is, a party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth de-

rive protection from, and *consequently* owe obedience or allegiance to, the sovereign, as such, *de facto*."

In Spain, the rights of a natural born subject are acquired by having been born in the kingdom, by being the child of a father a native thereof, or of parents who have resided there ten years with an intent of domiciliating there. In France, all are called natural born subjects who are born within its territory. There are exceptions to these rules, but they have no relation to color or descent—but refer to considerations alien to the present inquiry.

"The citizens," says Vattel, "are members of the civil society, bound to this society by certain duties, and subject to its authority; they equally participate in its advantages."

Citizenship, as the general rule of international law, is the result of birth in the dominion of the state to which allegiance is due. It is nowhere made to depend upon color or descent.

From the operation of these principles, slaves of African descent, as being property, must be withdrawn; for, as says Chief Justice TANEY, "no one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise;" it will become necessary to consider the effect of manumission, and the condition of the manumitted.

Slavery, as an institution resting neither on the law of nature nor of nations, derives its strength only from the local law by which it is established, and is restricted to the territory in which it exists. Without those limits, there is no law which binds the slave to his master.

"Slavery," says the Supreme Court of Mississippi, in *Harvey* v. *Decker*, Walker's R., 36, "is condemned by reason and the law of nature. It exists, and can only exist, through municipal regulations, and in matters of doubt, is it not an unquestioned rule that courts must lean in favor of life and liberty?"

"The state of slavery," says the Supreme Court of the United States, in *Prigg* v. *Penn*, 16 Pet. R., 611, "is deemed

to be a mere municipal regulation, founded upon and limited to the range of territorial laws.

As an institution, it ignores alike age, sex, race and condition. Under the Roman republic and empire, it held in impartial bondage the subtle Greek, the fierce Briton, the tawny Moor, and the dark Ethiopian. In our own time, it has bound to servitude the captured white man on the shores of the Mediterranean, and the black man on those of the Pacific and the Atlantic.

Slavery is therefore regarded as a condition imposed upon the individual by the municipal law. When that ceases, or is removed, his original and natural manhood is restored; he ceases to be a chattel, and becomes a free man; a member of the community in which he dwells; a citizen, where before he was the mere chattel of his master. The effect of manumission by the common law upon the *status* of the slave, is stated with great clearness and precision by GASTON, J., in *State* v. *Manuel*, 2 Dev. and Bat. R., 20.

"According to the laws of this state," (North Carolina,) says he, in delivering the opinion of the court, "all human beings within it, who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our revolution, all free persons born within the dominions of the king of Great Britain, whatever their color or complexion, were native born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not in legal parlance persons, but property; the moment the incapacity or disqualification of slavery was removed, they became persons, and were then either British subjects, or not British subjects, accordingly as they were or were not born within the allegiance of the British king. Upon the revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king, to a free and sovereign state. Slaves remained slaves.

British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the state, continued aliens. Slaves manumitted here became freemen, and therefore, if born within North Carolina, are citizens of North Carolina, and all free persons born within the state are born citizens of the state. * * * The constitution extended the elective franchise to every *freeman* who had arrived at the age of twenty-one years, and paid a public tax; and it is a matter of universal notoriety, that under it free persons, without regard to color, claimed and exercised the franchise, until it was taken from free men of color, a few years since, by our amended constitution."

Much the larger portion of the territory of the republic has been acquired by treaties with France, Spain and Mexico, made since the adoption of the constitution. In all these countries, the civil law establishes the rule of action and the basis of legal right. By the civil law, the uncontrolled power of manumission was vested in the master. All slaves manumitted by a Roman became citizens and members of his *gens* or race, of which they took the name. They were, however, considered as of an inferior order, and labored under many disabilities. At first they were enrolled in the rustic tribes, but afterwards they were confined to the two lowest of the city tribes, where they remained till a late period. The taint of servile blood was in part removed by one descent, and the second or third generation was deemed sufficiently pure for admission into the senate and the orders of nobility. Blair on Slavery among the Romans, chapter 9. Besides manumission by the *census*, by will and *vindicta*, there were other modes introduced, as by banquet, amongst friends, and by letter, addressed either to the slave himself or to a third party. The formula of manumission by letter is to be found in Rosini, a great authority, (Amsterdam ed. 1743, p. 78,) the literal translation of which is as follows:

"Let this man be a Roman citizen, so that from this day he may be a freeman, and safe from the chains of slavery, as if born of free parents; so that he may, in fine, pursue such

course as he may choose, and henceforth cease to owe us or our successors any of the services of his former injurious condition—and let him remain all the days of his life free and secure under sure and ample freedom, like the other Roman citizens, by this the title of his manumission and of his freedom."

The distinctions resulting from the different forms of emancipation were, however, ultimately abolished, and under the Roman empire, all slaves manumitted in the proper legal form, and under proper legal conditions, became complete Roman citizens.

"We have," says Justinian in the Institutes, Book one, Tit. five, section three, with just pride and honest exultation, as if moved by the inspiration of freedom, "made *all* the freed men in general citizens of Rome, regarding neither the age of the manumitted nor of the manumittor, nor the ancient forms of manumission. We have also introduced many new methods by which slaves may become Roman citizens, and the liberty of becoming such is that alone which can now be conferred."

"Freemen," says Domat, "are all those who are not slaves, and who have preserved their natural liberty. Manumitted persons are those who, having been slaves, are made free." Domat, Cush.'s ed., vol. 1, p. 144.

"The manumission of slaves in the colonies had the same effect as if born there." 1 Burge, 699, 702.

According to the same authority, birth, even though of alien parents, constitutes the *status* of a natural born subject. It has been seen that citizenship was the result of birth. It was equally so of manumission. Such was the rule in all the colonial possessions of European nations, and such is the law now in Brazil.

By the civil as by the common law, citizenship resulted from manumission—that is, the manumitted slave becomes a subject or a citizen, according to the form of government under which the manumission takes place, (2 Kent, Com. 6

ed., 258, note B,)—subject and citizen being convertible terms, as applied to natives. *The Pizarro*, 2 Wheat. R., 227.

Before the revolution, the native born free men by the common law were subjects of the government to which they owed allegiance, irrespective of color or descent, and upon and by the revolution, from being subjects they became citizens.

Upon the declaration of independence, each of the United States became sovereign and independent. "Under the peculiar circumstances of the revolution," says STORY, J., 3 Pet. R., 159, "the general, I do not say the universal, principle adopted, was to consider *all* persons, whether *natives* or *inhabitants*, upon the occurrence of the revolution, entitled to make *their choice* either to remain subjects of the British crown or to become members of the United States." This choice was necessarily to be made within a reasonable time. In some cases, that time was pointed out by express acts of the legislature; and the fact of *abiding* within the state after its assumed independence, was declared to be an *election to become a citizen*. That was the course in Massachusetts, New York, New Jersey, and Pennsylvania. In other states no specific laws were passed; but each case was left to be decided upon its own circumstances, according to the voluntary acts and conduct of the party. That the general principle of such a right of electing, to remain under the old or to contract a new allegiance, was recognized, is apparent from the case of *Com.* v. *Chapman*, 1 Dal., 53, and other cases cited. Those who adhered to the new government and transferred their allegiance thereto, became citizens of the same. All who were free, had this right of election, else they were not free. No particular color nor descent was required to confer this right of election. It resulted from freedom, and the necessity resting upon all to make an election. When it was made, and the individual determined to adhere to the new state, he was necessarily a member and a citizen of the same. He sustained the same

relation to the new government by choice, which he had sustained to the old by birth.

During the war of the revolution slavery existed in most of the states. In all, at its commencement, there were those of African descent who, by manumission or by legislative action, had become free.

It then becomes important to determine whether those thus free were regarded as citizens during the period of the confederation, and prior to the adoption of the constitution.

To answer this inquiry satisfactorily, it will become necessary to examine the articles of the confederation, and ascertain the action of the several states and of congress upon this subject, prior to their ratification.

The articles of the confederation, as subsequently adopted, were reported July 12, 1776, and were debated from time to time till July 12, 1778, when they were ratified by ten states. Maryland, which acceded to them last, did not become a party thereto till March 1, 1781.

The fourth article of the confederation, so far as its bearing is material to the matter under consideration, is as follows:

"ART. 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in the Union, the *free* inhabitants of *each* of these states—paupers, vagabonds and fugitives from justice excepted—shall be entitled to all privileges and immunities of *free citizens* in the several states," &c. 1 Elliot's Debates, 79.

The expressions here used are most general, and can receive but one construction. The object of the confederation is declared to be to "secure and perpetuate mutual friendship and intercourse among the *people* of the different states." There is no restriction by reason of color or descent, upon the generality of this expression. All who were "*free*," must be regarded as constituting the people, and included in the signification of that term. The expression, "free inhabitants," implies the existence of those who were not free.

It relates to condition, and distinguishes the free from those not free, that is, the slaves.

"The free inhabitants" are, with certain exceptions, to "be entitled to all privileges and immunities of free citizens in the several states." No inhabitant, who was free, but was included in the phrase "free inhabitants." But upon the comprehensive generality of this expression a limitation is engrafted. "Paupers, vagabonds and fugitives from justice," are all of the "free inhabitants" excepted from the rights of general citizenship. The particular exception is not to be enlarged, for it specially embraces all to be excepted. The exception made, the remaining "free inhabitants" are entitled to all privileges and immunities of free citizens.

It is thus apparent, upon the natural and only construction of this article, that *free* men of African descent were embraced in the expression, "free inhabitants," and that "all privileges and immunities of free citizens in the several states" were conferred upon them equally as upon the other free inhabitants. They are not included in the particular exception. They are included in the general phrase, from which the particular exception is taken.

That this was the meaning given to the article at the time, is made unmistakably and conclusively apparent, by the proceedings of the several states and of congress, before the articles of confederation were ratified.

By the preamble to the articles, it appears that though they had been previously reported, they had not been agreed to by the delegates till November 15, 1778.

As two years had elapsed between July 12, 1776, when they were reported, and July 9, 1778, when they were adopted, it is apparent that they must have been known and understood throughout the whole country. Accordingly, we find that "alterations, amendments and additions," were proposed "by certain states to the articles of confederation," the consideration of which came before congress on the 22d of June, 1778.

The delegates of South Carolina being called upon, moved the following amendments in behalf of their state: 1 Elliot, 90.

1st, in article four, between the words "free inhabitants" insert "white." 2d, in the next line after the words "these states" insert "those who refuse to take up arms in defence of the confederacy." 3d, after the words "the several states" insert "according to the law of such states for the government of their own free white inhabitants."

The fourth article, as proposed to be amended, would read thus:

ART. 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free (*white*) inhabitants of each of these states, (*those who refuse to take up arms in defence of the confederacy,*) paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states, (*according to the law of such states respectively, for the government of their own white inhabitants,*) &c.

The amendments proposed by the delegates of South Carolina show that the construction just given to article four was by them regarded as the true one. Their effect upon the article to be amended is equally obvious. They would have restricted the right of general citizenship to the "free (white) inhabitants," instead of restricting it to the "free inhabitants," irrespective of color. The proposed restrictions were negatived; the first and third amendment by a vote of two ayes, eight noes, and one divided; the second by a vote of three ayes and eight noes.

These propositions are undeniably established, that by the fourth article of the confederation as *then* understood—1st, that slaves were included in the word inhabitants; 2d, that the "free inhabitants" included all who were free, without respect of color; 3d, that the rights of general citizenship were conferred alike upon the free blacks as upon the whites.

The colonies, upon the severance of their connection with the British government, being sovereign and independent states, had uncontrolled power over their own laws, and over the civil condition of their inhabitants. The continental congress having refused to impose any limitation upon the meaning of the phrase "free inhabitants," or to restrict the rights of citizenship to the "free white inhabitants" of the respective states, it is obvious that all the free inhabitants were entitled to the rights and privileges of citizens in the several states; that is, to the rights of general citizenship.

The inquiry next arises as to what was the legal condition of free men of African descent, during the revolution, and at the time of the formation of the constitution; and whether they were up to, and at that time, regarded as American citizens.

The constitution of North Carolina was formed December 18, 1776. Its declaration of rights asserts "that all political power is vested in, and derived from, the *people* only." Its constitution provides "that *all persons* possessed of a freehold in any town in this state, having a right to representation, and also *all free men* who have been inhabitants of any such town twelve months next before and at the day of election, and shall have paid public taxes, shall be entitled to vote," &c.

"It is a matter of universal notoriety," says GASTON, J., in *State* v. *Manuel*, 2 Dev. and Bat., 20, "that under it, free persons, without regard to color, claimed and exercised the franchise until it was taken from free men of color, a few years since, by our amended constitution."

By article one, section three, of the amended constitution of North Carolina, adopted in 1835, the right of voting of colored people was expressly *abrogated*, (to use the language of the debates,) by a vote of sixty-six to sixty-one. Subsequently a motion was made by Mr. Gaston to allow "free negroes, mulattoes, persons of mixed blood, having the other necessary qualifications, the right to vote," which was nega-

tived in convention, by a vote of sixty-four to fifty-five. In the course of the debate on this motion, Mr. Kelley declared it "to be rank injustice and bad policy to refuse the free colored persons the right of voting when they possessed the same property and other qualifications which were prescribed for *other citizens*. He contended for the broad principle that all men are entitled to equal rights and privileges; that nothing but arbitrary power can forbid their free exercise, and that it is contrary to all the principles of free government to tax a man and refuse him a right to vote for a member to the legislature." Debates on the Constitution of North Carolina in 1835, 357.

It thus appears by the constitution of 1776, by the judicial expositions of the same by their highest tribunals, as well as by the proceedings of the convention by which the constitution was amended, that free men of color in North Carolina were deemed citizens of the state, and exercised the right of suffrage for more than half a century, till in 1835 it was taken from them.

In Virginia, at a general assembly in 1777, and "in the first year of the commonwealth," an act was passed for regulating and disciplining the militia. Chapter one is in these words:

"For forming the CITIZENS *of this commonwealth* into a militia, and disciplining the same for defense thereof, be it enacted by the general assembly, that *all free* male *persons*, hired servants and apprentices, between the ages of sixteen and fifty years, (except the governor and members of council, &c.,) who shall have previously taken before the court of their county *an oath of fidelity* to the commonwealth," &c., "shall, by the commanding officer of the county in which they reside, be enrolled into companies," &c. "The free mulattoes in the said companies, or battalions, shall be employed as drummers, fifers, or pioneers." Hening's Stat. at Large, vol. 9, p. 267.

By chapter two of the same session, it is made "lawful for any recruiting officer to enlist *all* able bodied young men, above the age of sixteen," but "it shall not be lawful to en-

list any negro or mulatto into the service of this, or *either of the United States*, until such negro or mulatto shall produce a certificate from some justice of the peace for the county wherein he resides, that he is a free man." 9 Hen. 275–280.

The preamble to an act passed in 1783, chapter 3, recites that many slaves during the war "were enlisted into the army as *substitutes*, being *tendered as free men*," and "that on the expiration of the term of enlistment of such slaves, that the former owners have attempted again to force them to return to a state of servitude, contrary to the principles of justice and to their own solemn promise;" * * * * and "whereas it appears just and reasonable that all persons enlisted as aforesaid, who have faithfully served agreeably to the terms of their enlistment, and have thereby of course contributed *towards the establishment of American liberty and independence*, should enjoy the blessings of freedom as a reward for their toils and labors," it was therefore enacted that all such should be "held and deemed free in as full and as ample a manner as if each and every one of them were specially named in this act," only one being named who was "declared free, in as full and ample a manner as if he had been born free." 11 Hening, 308.

It has been seen that the attempt in the continental congress to restrict the rights of general citizenship to the "free *white* inhabitants" was negatived by a vote of eight to two states. In May, 1779, however, the legislature of Virginia passed an act that "the free *white* inhabitants of every of the states, parties to the American confederation, (paupers, vagabonds, and fugitives from justice excepted,) shall be entitled to all rights, privileges and immunities of free citizens in this commonwealth." And the same act declared that "all *white* persons *born* within the territory of this commonwealth, shall be deemed citizens of this commonwealth." 10 Hening Stat. at Large, 129.

The act of 1779, restricting citizenship to "free white persons," being at variance with the articles of the confedera-

tion, was in 1783 repealed in express terms, and in its place was substituted an enactment "that all *free persons born within the territory* of this commonwealth, &c., all persons *other than alien enemies* who shall migrate into this state," and shall take the required oaths, "shall *be deemed citizens* of this commonwealth, and shall be entitled to all the rights, privileges and advantages of citizens." 11 Hening, 324. In 1786, this act was re-enacted in the same language, but by chapter ten, section eight, certain persons who had taken up arms were prohibited from being citizens. 12 Hening Stat. at Large, 261.

In 1777, an act was passed to "oblige the *free male inhabitants of this* state above a certain age, to assurance of allegiance to the same, and for other purposes," the preamble of which is in these words: "Whereas allegiance and protection are reciprocal, and those who will not bear the former are not entitled to the benefits of the latter;" and then follows the act.

It thus appears that the colored free men of Virginia, as citizens, took the oath of allegiance to the commonwealth, were enrolled in her militia, were enlisted in her service and in that of the United States, were tendered and received as substitutes, and during the revolution fought the battles of the country, and contributed towards the establishment of American liberty and independence."

The constitution of Maryland was adopted August 14, 1776. Its declaration of rights declares "that the inhabitants of Maryland are entitled to the common law of England, the trial by jury," &c., "that the right in the *people* to participate in the legislature is the best security of liberty and the foundation of all free government;" for this purpose, elections ought to be free and frequent, and every *man* having property in, a common interest with, and an attachment to the community, *ought to have the right of suffrage*," &c. The right of suffrage is conferred upon "all free men" having certain qualifications of age, residence and property, without any distinctions arising from color or race. The

general expressions "every man" and "all free men," leave no free man excluded. That the free colored population equally with the whites, were "entitled to the common law of England," and were to be regarded as citizens, has been fully shown by the able opinion of Mr. Justice GASTON. That they were then regarded as citizens, and were entitled to and exercised the right of suffrage, is clearly evidenced by an act of the assembly of Maryland, passed December 31, 1801, chapter ninety, being "an act to *alter* such parts of the constitution and form of government as relate to voters and qualification of voters." By this act the right of suffrage was restricted to "every free white male citizen of this state and *no other*," in the cities of Baltimore and Annapolis, in the election of such cities, or either of them, for delegates to the general assembly, &c.

By section eleven, of the same act, it was enacted that "every part of the constitution and form of government of this state repugnant to, or inconsistent with the provisions of this act, shall be, and the same are hereby *abrogated*, annulled and made void." This act was confirmed by an act passed January 8, 1803, chapter twenty.

Another amendment to their constitution was passed in 1809, chapter eighty-three, and confirmed in 1810, chapter thirty-three, which imposed the same restriction (to free white male citizens *and no other*) on voters for electors of president and vice-president, &c., &c., in the cities of Baltimore and Annapolis.

The restriction of suffrage to the free white citizens to particular localities, is a recognition of the general and universal right in other places of citizens *other* than the white, having the required qualifications to vote. Unless the constitution had conferred the right of suffrage upon *other* than white citizens, there was no occasion for the alteration which was made in their constitution. The passage of these acts, by which the colored free men of Maryland were deprived of the right of suffrage, is conclusive proof that they were regarded as *citizens*, that they had exercised the right of suf-

frage previously, and that henceforth they were to be deprived thereof, notwithstanding the provision of the constitution, which declares that "*every man* having property in, a common interest with, and an attachment to the community, *ought* to have the right of suffrage."

The inhabitants of Massachusetts formed, in 1780, a constitution by which all within its territorial limits became free. Formed amid the conflicts of the revolution, it was imbued with its principles. It abolished slavery, and conferred citizenship and equality of right upon all. The bill of rights and the protection it afforded, was limited to no complexion and to no race.

On the 16th of July, 1776, the people of New York, in convention, resolved "that all *persons abiding* within the state of New York, and deriving protection from its laws, owe allegiance to the said laws, and are *members* of the state." All free men, therefore, were members; and, being members, were citizens of the state. By the constitution of that state, formed in 1777, "every *male inhabitant* of full age" is entitled to the right of suffrage, if he have the other necessary qualification of residence and freehold estate.

In the convention to amend their constitution, in 1821, it appears that the constitution, as reported, confined the right of suffrage to the "*white*" citizens of the state. Mr. Peter A. Jay moved that the word "white" be stricken out. Chancellor Kent supported this motion, saying:

"We did not come to this convention to disfranchise any portion of the community, or to take away their rights. The constitution of the United States provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states,' and it deserved consideration whether such exclusion would not be *opposed to the constitution* of the United States."

In the same debate, Mr. Rufus King, who had been a leading member in the convention which formed the constitution of the United States, said:

"Take the fact that a citizen of color, entitled to all the

privileges of a citizen, comes here. He purchases a freehold; can you deny him the rights of an elector, incident to his freehold? He is entitled to vote; he comes like any other citizen; he is a citizen, and every freeholder your laws entitle to vote. He comes here; he purchases property; he pays your taxes, conforms to your laws; how can you, then, under the article of the constitution of the United States, which has been read, exclude him? As certainly as any children of any white man are citizens, so certainly the children of the black man are citizens," &c. Report of proceedings and debates of New York convention, 1821, p. 190, &c.

The amendment was carried, Kent, King and Van Buren voting in its favor.

Without examining particularly the constitution of other states, it may be regarded as unquestionably true, that colored freemen were regarded as citizens, and entitled to the right of suffrage, in most of the states, during the whole period of the revolution.

The convention by which the constitution was formed, met on the 25th of May, at Philadelphia. From a careful examination of their proceedings, it will appear that they recognized all freemen (natives) as citizens, without regard to race or complexion, as had been the case under the confederation.

The suffrage in congress, under the confederation, had been by states, each state having a vote.

The mode of apportioning representation and direct taxation presented the most difficult problem for solution, and in reference to which there was the greatest difficulty in coming to a satisfactory adjustment.

The inhabitants of the country were divisible into free white and free black citizens, aliens and slaves; and these distinctions were never lost sight of or disregarded by the convention.

Thus much being premised, it remains to consider the course of the convention in relation to the subjects of representation and direct taxation.

On the 29th of May, Governor Randolph, of Virginia, offered his fifteen resolutions, the second of which was as follows:

"2. *Resolved, therefore,* That the right of suffrage in the national legislature ought to be proportioned to the quotas of contribution, or to the number of *free inhabitants,* as the one or the other may seem best in different cases."

By the ninth article of the confederation, the quotas of contribution were to be "in proportion to the number of *white* inhabitants" in each state. This resolution assumes differing ratios, one or the other of which is to be adopted, as may be advisable. But "free inhabitants" cannot be regarded as coincident with "white inhabitants;" if it were so, the propositions, instead of being alternative, would be identical.

By the latter clause of this resolution, *free* blacks were included in the phrase "free inhabitants," and were to be represented, while slaves were excluded from the basis of representation.

On the same day, Mr. Charles Pinckney, of South Carolina, offered his draft of a federal government, by the third article of which the number of delegates was to be regulated "by the number of inhabitants," and by the sixth article it was provided that "the proportion of direct taxation should be regulated by the *whole number* of inhabitants of every description," &c.

These propositions made slaves equally with freemen, the basis of direct taxation and representation.

On the 30th of May, Governor Randolph having moved his second resolution, it was moved by Mr. Hamilton, of New York, and seconded by Mr. Spaight, of North Carolina, that the resolution be so altered as to read as follows:

"*Resolved,* That the right of suffrage in the national legislature ought to be proportioned to the number of *free* inhabitants."

This amendment, on motion, was postponed. On June 11, in committee of the whole house, it was moved by Mr. King,

of Massachusetts, and seconded by Mr. Rutledge, of South Carolina, to agree to the following resolution, viz.:

"*Resolved*, That the right of suffrage in the first branch of the national legislature ought *not* to be according to the rule established in the articles of confederation, but according to some equitable ratio of representation."

This resolution passed in the affirmative. It was then moved and seconded to add to the last resolution the following words: "according to the quotas of contribution."

It was then moved by Mr. Wilson, of Pennsylvania, and seconded by Mr. Pinckney, of South Carolina, to postpone the consideration of the last motion, in order to introduce the following words, after the words "equitable ratio of representation," namely:

"In proportion to *the whole number of white and other free* citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years, and *three-fifths* of *all* persons not comprehended in the foregoing description, except Indians not paying taxes in each state."

On the question to agree to Mr. Wilson's motion, *it passed in the affirmative.*

On the 15th of June, Mr. Patterson offered eleven resolutions, by the third of which the requisitions on the states, by the United States, were to be in the same proportion as the representation proposed by Mr. Wilson, thus making representation and the contributions of the several states to rest on the same basis.

On the 19th of June, the resolutions of Governor Randolph were reported as altered and *agreed* to in committee of the whole house.

The second resolution, as amended, becomes the seventh, and is as follows:

"7. *Resolved*, That the right of suffrage in the first branch of the national legislature, ought *not* to be according to the rules established in the articles of confederation, but according to some equitable ratio of representation, namely: in proportion to the *whole number of white and other free* citi-

zens and inhabitants of every age, sex and condition, including those bound *to servitude* for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes in each state." 1 Elliot, 181.

This enumeration embraces the whole population of the country.

The "*whole number of white*" citizens form one class.

The "*other free citizens*" form another class.

The "inhabitants of every age, sex and condition, including those bound to servitude for a term of years," form a third class, which embraces all free persons not included in the preceding classes, and refers to aliens and those bound to service as apprentices.

"Three-fifths of all persons not comprehended in the foregoing description," refers to the slaves.

The "Indians not paying taxes" are excepted.

The "other free citizens" are not white, for if so, they would have been included in the number of "white citizens." They were not aliens, for such are not citizens. They were not slaves, for neither are they citizens. They were citizens *other than white*, that is, *free colored citizens.*

Free colored persons, by this resolution, which was agreed to, were regarded by the convention as free citizens, and were made the basis of representation, as they subsequently were of taxation.

On July 12, the resolution "that direct taxation ought to be proportioned according to representation," was passed unanimously in the affirmative.

On the same day, it was likewise moved and seconded to add the following amendment to the resolution to which reference has just been made:

"And that the rule of contribution by direct taxation for the support of the government of the United States, shall be the number of *white inhabitants* and three-fifths of *every other description* in the several states, until some other rule, that

shall more accurately ascertain the wealth of the several states, can be devised and adopted by the legislature."

By this proposition, it will be perceived that direct taxation was to be in the ratio of white citizens and aliens, and three-fifths of the *free* blacks and the slaves, thus placing *free* blacks and slaves upon the same footing.

This amendment, however, was on the same day withdrawn.

On the 26th of July, twenty-three resolutions, which had been previously passed, were referred to a committee of five, termed the committee of detail, and the house adjourned to the 6th of August.

On the 6th of August, the committee of detail reported a draft of a constitution, by article seven, section three, of which it was provided that direct taxation should be regulated upon the basis of representation, as moved by Mr. Wilson, on June 11th, which report, on the next day, was referred to a committee of the whole.

On August 9, it was moved and seconded to insert the word "free" before the word "inhabitants," by which the ratio of representation was fixed at one representative for every fifty thousand inhabitants.

On September 8, a committee of five was appointed to revise the style and arrange the articles agreed to by the house, which, on the 12th of September, reported the constitution as revised and arranged, and as then agreed to, by paragraphs. Now, for the first time, the apportionment as to representation and direct taxation is merged in one and the same article.

Article one, section two, so far as it relates to the present inquiry, is as follows:

"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of *free* persons, including those bound to servitude for a term of years, and

excluding Indians not taxed, three-fifths of all other persons," &c.

On the 13th of September, it was agreed to compare the report from the committee of revisal with the articles agreed to by the house, and as they were read by paragraphs, it was moved to insert the word "service" instead of servitude, in article two, section one, which passed unanimously, leaving the article as it now stands.

Indians were excluded, it may be observed, not on account of race or color, but because they were members of distinct tribes or nations, living under the protection of the state or general government. "They may more correctly, perhaps, be denominated domestic, dependent nations," says MARSHALL, C. J., in the *Cherokee Nation* v. *Georgia*, 5 Pet. R., 1.

The last finish, to use the expressive words of Mr. Madison, given to the style and arrangement of the constitution, fairly belongs to Mr. Morris, of New York, by whom its last transcription was made, and who, in the language selected, carefully rejected all redundant and equivocal expressions, making it as clear as language would permit.

The words "free persons" were accordingly used instead of "white and *other* free citizens, and inhabitants of every sex and condition." The expression "free persons," embraced the same classes as that for which it was substituted, and includes free persons of color. "Indians not taxed" were in each case excepted. The remaining terms of the basis were in fact unchanged; so that the free colored population was embraced in the terms "free persons."

The whole population is divided into two classes. The whole number of free persons including those bound to service for a term of years, and excluding Indians not taxed, and three-fifths of all other persons. The free blacks are not in the *three-fifths of all other persons*, because they were free, and being free, are included in the first class. The distinction is obviously that of *status*, not of color or descent; it is that between free men and slaves.

It had been proposed to base representation, or taxation,

upon the *whole* number of inhabitants, which would have included slaves—upon the whole number of *free* inhabitants, which would have included free blacks and excluded slaves —upon the number of *white* inhabitants and three-fifths of every other description, by which the free blacks and slaves would alike have been computed at three-fifths of their numbers, and these several propositions had been rejected. The only remaining proposition to base the representation upon the "whole number of *white* and *other free* citizens and inhabitants of every age, sex and condition," evidently referred to a class of citizens *other* than white citizens, and could only relate to free colored persons, and, cleared of its redundancy by Mr. Morris, is found in the constitution in its equivalent and substituted phrase, "free persons." It is manifest, therefore, that free persons of African descent, being native born, were regarded by those by whom the constitution was framed, as free citizens, as they had been during the revolution, and under the confederation.

The states sovereign, independent and equal under the confederation, determined respectively the citizenship of their members. When the convention which formed the constitution assembled, these pregnant facts existed. The citizenship of the free colored population was upon the doctrines of the common law, the necessary result of their freedom, and was recognized in very many of the southern as well as in all of the northern states. The states in congress assembled had, during the confederation, refused with great unanimity to restrict the rights of general citizenship to the free *white* inhabitants of each state. Different states had formed constitutions, which by practical construction as well as by judical determination, conferred the rights of citizenship upon the free blacks. During the debates in the convention which formed the constitution, no proposition received its sanction, the effect of which was to deprive those who, by the law of the place of their residence, were citizens of their *then existing* rights of citizenship, or to limit or restrict those rights. On the contrary, under the words *other*

free citizens, they were by the convention in committee of the whole recognized as citizens.

No language can be found in the constitution which rests citizenship upon color or race. All free persons go to constitute the basis of representation and taxation. They equally constitute that basis, whether white, black, or mixed. Freedom respects not color, for the black man may be free. Personality is not limited to race or complexion, for the black man is included in the class of persons, whether slave or free. Citizenship does not *necessarily* depend upon color or descent, and by the constitution it is not *specially* made so to depend.

The constitution in its preamble asserts the great objects for which "we the people of the United States" "do ordain and establish this constitution for the United States of America."

As the constitution is formed for the benefit of and adopted by the people, that term must include all for whose benefit it was formed, and by whose votes it was adopted. As the free blacks were in some of the states citizens, and entitled to vote, by what rules of construction can any portion of the "people" (which certainly must include all who were legally competent to act on the question of its acceptance or rejection,) be deprived of previously existing rights? What language can be found indicating the purpose of forming a new and hybrid class unknown to any system of law—neither citizens, aliens nor slaves—a class owing allegiance to the state and bound to obey its laws, and yet without their protection, "having rights which no white man was bound to respect." No express words can be found, showing an intention of thus dividing the free native born inhabitants into classes, and of conferring all rights upon one portion, and of depriving the other of those previously belonging to them. No words can be found from which by any construction, however forced, any such implication can arise.

Citizenship of the United States is derived from birth, acquired by naturalization, and conferred by treaty. Its citi-

zens are by the constitution, either native born or naturalized; there can be no other. So far as citizenship is derived from a state, it is by *birth* alone, congress having the exclusive power to pass naturalization laws.

It is a general rule of municipal as of international law, acknowledged alike in the new as in the old world, by every civilized nation, that birth (the parents being free) in the state to which allegiance is due, confers citizenship. If it had been the design of those who framed the constitution to change or modify in any respect this rule, and deprive any portion of free men of its benefits, such design would have been apparent in the resolutions or debates preceding its formation, as well as in the constitution when formed. The design to abolish an old and universal rule and to introduce a new and unheard of distinction, could not but be apparent. But in vain will the most careful scrutiny find any words from which such design can be inferred.

"Previous to the adoption of the constitution," remarks TANEY, C. J., in *Scott* v. *Sandford*, 19 How. R., 405, "every state had an undoubted right to confer on whomsoever it pleased, the character of citizen, and to endow him with all its rights." Subsequently he adds, "the constitution has conferred on congress the right to establish an uniform rule of naturalization, and this right is evidently *exclusive*, and has always been held by this court to be so." This power to "establish an uniform rule of naturalization" is the only restriction upon the states in respect to citizenship, unless the treaty making power be regarded as such. The states may confer upon an alien the right of suffrage and to hold real estate, and other privileges peculiar to citizenship, but still he would not thereby acquire the *status* of a citizen. "So, too," says TANEY, C. J., "a person may be entitled to vote by the law of the state who is not a citizen even of the state itself." Citizenship can only be by birth, naturalization or treaty. The power of the state, except so far as specially restricted, remains as it was under the confederation.

By article four, section three, new states may be admitted.

By section four of the same article, "a republican form of government" is guarantied to every state in the Union. The new as well as the old states may extend and enlarge the rights of citizenship to the native born inhabitants as they may deem advisable, without reference to race. It is only required that the form of government be republican; and if the rights of citizenship are conferred upon a free man, though his ancestor may, at some unknown and indefinitely remote period of time, have been forcibly and wrongfully taken from Africa, it would hardly seem to conflict with this guarantee of the constitution.

The tenth amendment of the constitution establishes as a rule of construction, that "the powers not *delegated* to the United States by the constitution, nor *prohibited* by it to the states, are *reserved* to the states respectively, or to the people."

No power is "*delegated* to the United States" over the subject of citizenship, except that of passing a naturalization law and the treaty making power.

The states are not *prohibited* in reference to this subject, save only in the two instances to which reference has just been made.

With these exceptions, the *reserved* power of the state to determine who shall be its citizens is sovereign and unlimited.

Nothing, then, can be found in the constitution depriving a citizen of a state of *then* existing rights, or restricting or prohibiting the states in or from the exercise of unlimited power over this whole subject matter, except in the instances just specified.

The equality of the states being the foundation upon which the Union rests, the equality of the citizens of the states, and the consequent right of general citizenship, would seem to follow as a necessary consequence therefrom. Indeed, the states could hardly be regarded as equal unless equality of rights were conceded to the citizens of the several states.

By the fourth article of the confederation, "the free inhabitants of *each* of these states—paupers, vagabonds and fugitives from justice excepted—shall be entitled to all privileges and immunities of free citizens in the several states."

By the constitution, the same right of general citizenship is conferred on the citizens of the several states in almost identical words.

By article four, section one, "the citizens of *each* state SHALL be entitled to all privileges and immunities of citizens in the several states."

The rights of general citizenship are not taken away even from "paupers, vagabonds and fugitives from justice." There are no exceptions whatsoever from the all-embracing generality of this section.

The states existing in full sovereignty before the constitution, the citizenship of the states must *have preceded* that of the citizenship of the United States. Neither this, nor any other clause in the constitution, defines what shall constitute citizenship of the state, and as a consequence thereof, citizenship of the United States. It leaves that to the states, with the exceptions already considered. It assumes the citizenship of the state, however it may be constituted, as the basis of general citizenship, and derives that of the United States therefrom. It assumes that the principles upon which it is conferred may be different; nevertheless, it confers the same "privileges and immunities" upon the citizens of *each* state. "Uniformity of laws in the states," says CHASE, C. J., in *Campbell* v. *Morris*, 3 Har. and McHen., 553, "is contemplated by the general government *only* in two cases, on the subject of bankruptcies and *naturalization*. While uniformity is required where citizenship is acquired by naturalization, *it is not* when it is the consequence of birth. The states are sovereign over this whole subject, except as to aliens. The privilege of general citizenship under the confederation, was not restricted as to color nor race. Under the constitution, there is found nothing which limits it to any particular portion of the citizens of the state. It is

given to *all*, without even the reservation of paupers, vagabonds and fugitives from justice."

"It may be esteemed the basis of the Union," remarks Mr. Hamilton, in the Federalist, No. 8, "that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." "It is obvious, that if the citizens of each state were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as aliens." "The intention of this clause was to confer on them, if one may so say, general citizenship, and to communicate to all, the privileges and immunities which the citizens of the same state would be entitled, under like circumstances. Story, section 1809. Every citizen of a state is, *ipso facto*, a citizen of the United States." Ib., section 1687.

It follows, therefore, if in a single state free men of African descent (natives) were citizens thereof, they were, by that very fact, citizens of the United States. It has been shown, that before the adoption of the constitution they were citizens, in most of the states, by virtue of their respective laws and constitutions, and that, by the constitution, no change nor deprivation of rights took place; consequently, they were, are, and must remain citizens of the United States, under and by virtue of its constitution.

The correctness of these deductions will be made, if necessary, more apparent, upon examining other portions of the constitution, and the action of government under it.

Citizenship of the United States is conferred upon aliens through the naturalization laws congress may enact, and the treaties government may make.

The power "to establish an uniform rule of naturalization" is unlimited in its extent. It covers the whole field of legislation. All races of men are within the generality of its terms. It excludes none. It may embrace the African equally with the European, the Malay or the Hottentot, if congress should deem such legislation expedient. The power is unquestionably granted to confer citizenship upon the

black equally as upon the white man—a power most manifestly inconsistent with the hypothesis that, by the constitution, descent from a servile African race was a perpetual bar to the rights of citizenship of the United States—that by its provisions there was an interdict upon the states and upon the general government, against conferring it upon them; and that those possessing it previous to its adoption, have thereby, in some mysterious and inexplicable way, been deprived thereof.

The grant of power unlimited, its exercise is a matter of discretion. It is true, as remarked by TANEY, C. J., in the case of *Scott* v. *Sandford*, that "no one of that race had ever emigrated to the United States voluntarily." It is equally true, that there was little in the then existing state of the country to induce their voluntary emigration. Neither was a change in this respect anticipated. The emigration which called for the action of congress was European. Their legislation obviously referred to the actual emergencies of the country. The possible contingency of an African emigration is not even the subject of an allusion during the debates upon this question. If the word "white" had been stricken out of the naturalization law, it would have been equally constitutional. Whether the word should be in or out, was for congress in its wisdom to determine.

The power to confer citizenship upon the alien African, is unquestionably granted. But it is absurd to suppose that power would be given, if in and by the same instrument, that right is denied to the free native of the same race. The absurdity becomes more patent, when it is remembered that the power to naturalize is undeniable, while the supposed restriction is only an asserted implication, without any words from which the most perverse and sinister ingenuity could imply it.

It next becomes important to ascertain the condition of the free *alien* inhabitants of the various territories, which, by treaties at different times, have become portions of the republic, and by legislation have become incorporated there-

with; and whether any distinction is made on account of complexion or descent, by which any portion of the *free* inhabitants, resident upon the territories annexed, are to be debarred from the rights and privileges of citizens of the United States.

The civil law prevailed in all the territorial acquisitions of the republic, except those from the various Indian tribes with whom treaties have been made. By that law, as has been seen, the slave, upon emancipation, became a freeman and a citizen.

By the third article of the treaty with the French republic, of 30th of April, 1803, for the purchase of Louisiana, it is provided that the *inhabitants* of the ceded territory shall be entitled to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and in the meantime shall be maintained in the free enjoyment of their *liberty*, &c.

By the sixth article of the treaty with Spain, by which Florida was ceded, "the inhabitants" of the ceded territory are to be incorporated into a state "*as soon* as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of *all* the privileges, *rights* and immunities of the citizens of the United States," using, it will be perceived, more expressive language than the clause of the constitution which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The word "inhabitants" undoubtedly referred only to those who were free, for by the preceding article provision is made for such of the inhabitants "as may desire to remove to the Spanish dominions."

By the fourteenth article of the treaty with the Choctaws, of September 27, 1830, "each Choctaw head of a family, being desirous to remain and become a *citizen* of the states, shall be permitted to do so by signifying his intention to the agent within six months from the ratification of this treaty," &c. He is to be entitled to land for himself and his children. It is further provided in the same article, that "per-

sons who claim under this article shall not lose the privilege of a *Choctaw citizen*," &c.

Extensive territorial acquisitions have likewise been made by treaty with Mexico.

On the 15th of September, 1829, Guerrero, the chief executive magistrate of the Mexican republic, himself of mixed blood, issued his decree abolishing slavery, in which are these memorable words:

"Desirous to signalize the year 1829, the anniversary of our independence, by an act of national justice and beneficence that may turn to the advancement of so important a result; that may consolidate more and more public tranquility; that may co-operate to the aggrandizement of the republic, and restore to the unfortunate portion of its inhabitants *those rights which they hold from nature*, and that the people may protect, by wise and equitable laws, in conformity with the 30th article of the constitutive act:

"Making use of the extraordinary faculties which have been granted to the executive, I thus decree:

"First, that slavery is abolished in the republic; second, consequently, all those individuals who, until this day, looked upon themselves as slaves, are free."

Subsequently, on the 5th of April, 1837, an act of the Mexican congress was passed in these words:

"ART. 1. Slavery, *without any exception*, is and shall remain abolished throughout the entire republic."

By this decree and this enactment, which are but the enunciation of the doctrine of inspiration, that God "hath made of one blood all the nations of the earth," the various races inhabiting Mexico, and confusedly mingled together, were restored to the privileges of a common humanity and the equality of human right established by God, was legislatively recognized by man. The "blue blood" of the descendants of the Spanish conquerors lost its pre-eminence, and all became members of the same civil community, "citizens," and entitled to the rights guarantied by the constitution of that republic.

By the treaty with Mexico, of Guadaloupe, Hidalgo, of February, 1848, California and New Mexico were ceded to the United States. By the eighth article, Mexicans established in the territories ceded to the United States, were free to remain, and "those who shall prefer to remain in said territories may either retain the title or rights of Mexican citizens, or acquire those of *citizens of the United States*," and this election is to be made in one year. By article nine, Mexicans "who shall not preserve the character of citizens of the Mexican Republic," &c., "shall be admitted at the proper time (to be judged of by the congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution," &c.

Where territory is acquired by treaty, "the *laws*, rights and institutions of the territory so acquired," remarks Mr. Justice JOHNSON, of South Carolina, in 1 Pet. R., 517, "remain *in full force* until rightfully altered by the new government." In *Strother* v. *Lucas*, 12 Pet. R., 410, Mr. Justice BALDWIN says, in reference to the same subject, that "the laws, whether in writing or evidenced by the usage and customs of the conquered or ceded country, *continue in force* till altered by the new sovereign."

By these various treaties, those who were subjects or citizens of the state ceding, became, by virtue of the cession, citizens of the state to which it was made. As by the laws of the state ceding, freemen of European, Indian, African or mixed blood, were citizens of the state ceding, they thus became citizens of the United States, by which these acquisitions were made. Thus has the citizenship of the states been conferred upon the Choctaw, with liberty to retain that of his tribe, thereby allowing him a *double citizenship*. Thus has citizenship of the United States been granted to the Spaniard, the Frenchman, the Indian, and the negro, to the white, the red, and the black man, to the mulatto and the mestizo, the quadroon and the quintroon, to the Chino and the Zambo, to races so commingled in blood that a foreign

and uncouth nomenclature was required to designate the varying proportions of the different bloods entering into the composition of this motley population. Thus have these heterogeneous races become naturalized.

It thus appears that, by treaty, citizenship has been conferred upon those of African descent. But if African descent, from a servile stock, is by the constitution an inexorable and insuperable bar to American citizenship, then has this government entered into treaty obligations which, by the constitution, it cannot perform. But if the government can constitutionally perform its treaties, if African descent, with its serville taint, is no bar to the citizenship of the *alien* of that race, speaking a different language, having a different form of religion and different associations, it could never have been intended that the native born of that race should have been excluded therefrom. As, then, African descent from a servile ancestor does not prevent the alien from becoming a citizen of the United States, it follows that such descent is no bar to the attainment of that right, and such being the case, the state in which they reside may confer this privilege upon that portion of their native born population, if it seem good to the people thereof so to do, by making them citizens thereof, and being so citizens, becoming by virtue of the constitution citizens of the United States.

The government of the United States, in its intercourse with other nations, has claimed the free colored man as a citizen, has asserted his rights, and demanded and received reparation for his wrongs. The British ship of war Leopard, on the 22d of June, 1807, in the exercise of the claim of its government to impress, fired on the American frigate Chesapeake, and upon her lowering her flag, British officers seized and carried away William Ware, Daniel Martin and John Straham, three sailors, enlisted in the navy of the United States, the two first of whom were colored men. On the 2d of July following, Mr. JEFFERSON, then President of the United States, issued his proclamation, countersigned by Mr. Madison, interdicting our harbors and waters to British men

of war, in which, speaking of this outrage, he says, "and that no circumstance might be wanting to mark its character, it had been previously ascertained that the seamen demanded were native citizens of the United States." Annals of Cong. (10th Cong.) vol. 1, p. 948. On the 6th of July, Mr. Madison, writing to our minister at London, Mr. Monroe, says, "the seamen taken from the Chesapeake had been ascertained to be native citizens of the United States." 3, Am. state papers, p. 184. Upon the receipt of this letter, Mr. Monroe at once makes reclamation on the British government for the outrage, informing the British minister of the citizenship of those seized. 3, Am. state papers, p. 186. Upon the meeting of congress, their attention was at once called to the subject, and a committee on the portion of the message relating thereto was appointed, which called on Mr. Madison for proof of the citizenship of those seized, and this being at once furnished by him, they reported on the 17th of November, 1807, "that it has been incontestibly proved, as the accompanying documents will show, that William Ware, John Straham and Daniel Martin are citizens of the United States," &c. 3, Am. state papers, 6. From the evidence furnished by Mr. Madison, p. 15, it appeared that two of those above named were colored. This formed the subject of perplexed and irritating diplomacy between the two nations, till November 1, 1811, when Mr. Foster, in behalf of the British government, disavowed the unauthorized acts of the officer in command, who, in token of the king's disapprobation, had been recalled, proposed to return the men to the ship from which they had been taken, and to make satisfactory pecuniary recompense to the sufferers for the injuries they had sustained. The apology of the British government, being deemed satisfactory, was accepted.

Now, the highest good faith should be required among all governments. Three Presidents of this nation, all from Virginia, in their diplomatic intercourse with a foreign nation, have asserted the citizenship of colored men, and have demanded reparation for the insult to our flag, by taking them

from its protection. It would be a reproach to their intelligence to suppose that those distinguished statesmen, two of whom had taken a leading part in the formation of the constitution, could have so misunderstood the purpose of its framers as ignorantly to regard those as citizens who were not. It would be a still greater reproach to their integrity to suppose that, not regarding them to be citizens, they should falsely assert them to be so, for any purpose whatsoever. It surely cannot be erroneous, relying on the opinions of Jefferson, Madison and Monroe, to hold those as citizens whom they held as such, and to the vindication of whose rights as citizens they pledged the honor of the nation.

The act of congress of May 17, 1792, provides for the enrollment of "every free, able bodied *male* citizen" in the militia of the several states. The enrollment of "*white* male citizens" implies that there are citizens who, not being white, are not to be enrolled, equally as the enrollment of "able bodied" citizens implies that there are citizens who are not to be enrolled, because not able bodied.

The act of February 23, 1803, prohibiting the importation of certain persons into the states where by the law of such states their admission is prohibited, forbids the importation of any negro, mulatto or other person *not being a citizen* or registered seaman of the United States, implies that there may be persons of color who are citizens and who may be registered seamen, and who, being citizens, are excluded from the operation of this act, and may be imported without the master of the vessel in which they are brought incurring any penalty.

The state under the confederation, being sovereign, had unlimited power over the citizenship of its inhabitants, and might confer that right upon its colored free men. *That power was left unimpaired by the constitution.*

The conclusion to which I have arrived, after a careful consideration of the question, and a full examination of the authorities bearing thereupon, is, that there is no prohibition

in the constitution of the United States, express or implied, to free men of African descent becoming citizens of a state, and as such, by virtue of their state citizenship, becoming citizens of the United States. I can find no justification for any such interpolation in the clause in the constitution conferring general citizenship upon the citizens of *each* state as that it shall read "the citizens of *each* state (the *free native colored citizens of each state excepted,*) shall be entitled to all privileges and immunities of citizens in the several states." The framers of the constitution made no such article. The people adopted no such article. Interpolation is no judicial duty.

As, however, the highest tribunal of the nation is alleged to have decided otherwise in the recent case of *Scott* v. *Sandford*, the occasion would seem to impose the necessity of a brief examination of that decision, and of the authorities by which it is supported, and the reasoning upon which it rests.

It may indeed be well questioned whether the "opinion" of any court is not to be regarded rather as evidentiary of what the law is, than as the absolute law. If it were regarded as the absolute law, it would imply infallibility on the part of the court deciding. "But what court," asks Mr. Justice NELSON, in this very case, "has not changed its opinions? What judge has not changed his?" As there are no courts in which there have not been contradictory decisions upon the same question, to hold the decisions of any court as absolute law, would be to imply the correctness of opposing and conflicting decisions, which would seem to be sufficiently absurd. The true rule on this subject seems most clearly and forcibly expressed in the following language of a distinguished jurist:

"The decisions of courts are not *the law;* they are only evidence of *the law.* And this evidence is stronger or weaker, according to the number and uniformity of adjudications —the unanimity or *dissension* of the judges—the solidity of

the reasons on which the decisions are founded, and the perspicuity and precision with which these reasons are expressed."

The judicial power of the Supreme Court of the United States is limited "to all cases of law and equity arising under the constitution," &c., and is fully defined in article three. It has been denied by Mr. JEFFERSON, and other distinguished statesmen and jurists, that their decisions upon "cases in law and equity" have any binding force, beyond the case decided, upon the courts of the several states, or on the other departments of government.

"Certainly," writes Mr. JEFFERSON, vol. 6, p. 461, "there is not a word in the constitution which has given that power to them, more than to the executive or legislative branches. Questions of property, of character and of crime being ascribed to the judges, through a definite course of legal proceedings, laws involving such questions belong of course to them, and as they decide on them ultimately and without appeal, they of course decide for themselves. The constitutional validity of the law or laws again prescribing executive action, and to be administered by that branch ultimately, and without appeal, the executive must decide for themselves, also, whether under the constitution they are valid or not. * * * And, in general, that branch which is to act *ultimately*, and *without appeal*, on any law, is the *rightful expositor* of the validity of the law uncontrolled by the opinion of the co-ordinate authorities." The Supreme Court of Virginia, in *Hunter* v. *Martin*, 4 Munf. R., 1, held unanimously, that in case of a difference of opinion between the two governments as to the extent of the powers vested by the constitution, while neither party is competent to bind the other, the courts of each have power to act upon the subject, neither being bound by the decisions of the other. Recently, in *Padelford* v. *Fay*, 14 Georgia R., 439, the Supreme Court of Georgia held, as they had done in previous instances, "that the Supreme Court of Georgia is co-equal and co-ordi-

nate with the Supreme Court of the United States, and, therefore, the latter cannot give the former an order or make for it a precedent."

On the other hand, it was held by MARSHALL, C. J., in *Cohens* v. *Virginia*, 6 Wheat- R., 413, that "the necessity of uniformity as well as of correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in one single tribunal the power of deciding, in the last resort, all cases in which they are involved." In the opinion of Mr. Webster and other jurists, the decisions of the Supreme Court are not to be limited to the particular case, but are to be regarded and followed by the co-ordinate departments of government, and are conclusive upon the judiciary of the several states.

It does not, however, become necessary to consider the authoritative force of a decision of the Supreme Court of the United States, deemed clearly erroneous, because, upon examination, it will be apparent that a majority of that court have not decided that freemen of servile African descent are not citizens of the United States. No occasion arises, therefore, for the discussion of this grave, important and vexed question, as to how far, and to what extent, the decisions of that court are obligatory upon the courts of a state.

That freemen of African descent are citizens of the United States, is most conclusively shown in the clear and elaborate opinions of Mr. Justice MCLEAN and Mr. Justice CURTIS, in which, with a fullness of learning and a cogency of argumentation rarely equaled, they have demonstrated their right to citizenship in the land of their birth.

The opinion of Mr. Justice CATRON is made to depend upon his peculiar views of our treaty with Louisiana, and does not touch upon the inquiry of the senate of this state as to citizenship.

That his views concur with those of Mr. Justice MCLEAN and Mr. Justice CURTIS, is made most manifest by his very able opinion in *Fisher's Negroes* v. *Dobbs*, 6 Yerg. R., 199,

pronounced by him when Chief Justice of Tennessee, in which he uses the following most explicit language:

"The idea that a will emancipating slaves, or a deed of manumission, is void in this state, is ill founded. It is binding on the representatives of the devisee in the one case, and the grantee in the other, and communicates a right to the slave; but it is an imperfect right, until the state, the community of which such emancipated person is to become a *member*, assents to the contract between the master and the slave. It is adopting into the body politic a *new member*, a vastly important measure in every community, and especially *in ours*, where the majority of free men, over twenty-one years of age, govern the balance of the people, together with themselves; where the *negroe's vote at the polls* is of as high value as that of any man. Degraded by their color and condition in life, the free negroes are a very dangerous and most objectionable population where slaves are numerous. Therefore, no slave can be safely freed but with the assent of the government where the act of manumission takes place. But this is a mere matter of public policy, with which the master or the slave cannot concern. It is an act of *sovereignty* just as much as naturalizing a foreign subject. The highest act of sovereignty a government can perform, is to adopt a *new member*, with all the privileges and duties of *citizenship*."

The plea in abatement in the circuit court of Missouri was, that the plaintiff, being of servile origin, was not a citizen of Missouri, and therefore could not maintain his suit. This plea was overruled, but upon the *facts as agreed*, the court held that he was not a citizen, and gave judgment for the defendant. It was held by Mr. Chief Justice TANEY, and Justices WAYNE and DANIEL, that "this judgment on the plea in abatement, was erroneous."

According to the views of Mr. Justice NELSON, the plaintiff being upon the agreed facts a slave, by the law of Missouri, could not maintain this suit, and his conclusion "was

that the judgment of the court below be affirmed." Mr. Justice GRIER "concurred in the opinion delivered by Mr. Justice NELSON, on the questions discussed by him."

What their decision may be on the subject matter of this inquiry, is not disclosed, but as the law favors life and liberty, and as the equality of all before the law is the elementary principle of our institutions, it is not unreasonable to assume, in the absence of proof to the contrary, that they will coincide with the other members of the court, to whose opinions allusion has just been made, and according to which free men of African descent are citizens.

But whatever may be the authoritative force of a decision of the Supreme Court of the United States, there can be no doubt that its statements, as to the past history of the country, are binding neither on the historian nor the jurist. In the case under consideration, the opinion of Mr. Chief Justice TANEY rests upon the degraded condition of the African race, and certain deductions which he claims to draw from the alleged public opinion in reference to them. "They had," he remarks, "for more than a century before, been regarded as of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no *rights which the white man* was bound to respect; and that the *negro might justly and lawfully be reduced to slavery* for his benefit. He was bought and sold, and treated as an ordinary article of merchandise, whenever a profit could be made by it. This opinion was at *that time fixed and universal* in the *civilized* portion of the white race. It was regarded as an axiom in morals, as well as in politics, which no one *thought of disputing, or supposed to be open* to dispute; and men in every grade and position in society, daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion."

On the 6th of July, 1775, the provincial government of

Georgia "resolved, 4, that we will neither import nor purchase any slave from Africa, *after this day.*"

The continental congress, on the 6th of April, 1776, resolved "that no slaves be imported into any of the United States."

The convention of Delaware, on the 27th of August, 1776, article twenty-seven, resolved "that no person hereafter in this country, from Africa, *ought* to be held in slavery on any pretence whatsoever, and no negro, Indian or mulatto slave *ought* to be brought into the country from any part of the world whatever."

Virginia, in the session of 1778, passed an act for preventing the further importation of slaves, by which it was enacted by chapter one, section one, that "after the passage of this act, no slave or slaves shall hereafter be imported into this commonwealth by *sea* or *land;* nor shall any slave so imported *be sold* or bought by *any person* whatsoever," and by section three of the same act, "every slave imported into this commonwealth, contrary to the true intent and meaning of this act, shall, upon such importation, become free." 9 Hening, st. 471.

When the constitution was formed, the word slave was carefully excluded, out of deference to the views of a large portion of its members. "The northern delegates," says Mr. Iredell in the North Carolina convention, Elliot, 174, "owing to their peculiar scruples, chose that the word slave should not be mentioned."

Mr. Mason, of Virginia, described the slave trade as an "infernal traffic," and held it essential in every point of view, that the general government should have power to prevent the increase of slavery. 5 Elliot, 458.

"Mr. Madison thought it wrong to admit in the constitution the *idea* that there could be property in men." 5 Elliot, 478.

"We intend this constitution," says Mr. Madison, addressing the convention, "to be the great charter of human liberty to the unborn millions who shall enjoy its protection,

and who shall never see that such an instiution as slavery was ever known in our midst."

Indeed, no historic facts are better established than that the general sentiment of the country, north and south, was against slavery, and that its entire abolition was equally desired and expected, and that none were more anxious for its utter and final extinction, than the Jeffersons and Madisons of that day.

But these remarks of C. J. TANEY, if applicable to the slave, can furnish no basis for his argument; for the slave being legally a mere chattel, cannot, while he continues such, become a citizen; and the necessary degradation of the slave affords no reason for the denial of citizenship to the free man.

If they are intended to express the condition of the free man of African descent, and of the general sentiment of the country in regard to them, no more melancholy illustration can be furnished of, no more terrible denunciation can be uttered against a system, than that its results are such that even freedom will not elevate the subject, nor free and liberal institutions humanize the dominant race; that the former dare not claim their legal rights and the latter will not respect them.

The justice of these remarks, as relating to the free men of either race, even at the south, may well be doubted. "Indeed," says CRABB, J., in *Vaughan* v. *Phebe*, Mar. & Yer. (Tenn.,) "it is no light matter to be a *freeman* in these United States. Freedom in this country is not a mere name—a cheat with which the few gull the many. It is something substantial. It embraces within its comprehensive grasp all the useful rights of man; and it makes itself manifest by many privileges, immunities, external public acts. It is not confined, in its operations, to privacy, or to the domestic circle. It walks abroad in its operations; transfers its possessor, even if he be black, or mulatto, or copper-colored, from the kitchen and the cotton field to the court-house and the election ground; makes him talk of

magna charter and the constitution; in some states renders him a politician; brings him acquainted with the leading citizens; busies himself in the political canvass for office; takes him to the ballot-box; and above all, secures to him the enviable and inestimable privilege of trial by jury. Can it be said that there is nothing of a public nature in a right that thus, *from its necessary operation*, places a man, in many respects, on an equality with the richest and the greatest, and the best in the land, and brings him in contact with the whole community?"

That there should be a prejudice against men just emerging from a servile condition, and against the color of those thus emerging, is neither a matter of doubt, nor a cause of wonder. The pride of race is but a more extended pride of birth, and though not particularly consistent with popular institutions, is nevertheless of unquestioned existence.

An argument is attempted to be drawn against the citizenship of the African race, from the legislation of the different states in reference to marriage between the races, and the organization of the militia.

The marriage to be prohibited, implies parties of each race desirous of forming the connection prohibited, else there would be nothing to prohibit. Being desirous of forming the connection, it is apparent that those of each race thereby prevented would equally suffer in their feelings from the prohibition, which in its operation is most impartial. The statutes, on this subject, apply equally to the white and the black, and are designed to prevent all who are desirous to enter into such marriage, from so doing. It shows that the legislature deems such unions inexpedient, and as a matter of public policy to be prohibited; but it is difficult to perceive why it is more onerous upon one race than the other, (for the assumption is, that both desire it, and hence the prohibition,) or why it should deprive either of citizenship.

The constitution of the United States confers upon congress the power "to provide for organizing, arming and dis-

ciplining the militia," and the state regulations on this subject are based upon the act of congress which provides for the enrollment of the "white" citizen. It is not readily perceived how this can be regarded as "the entire repudiation of the African race" by a state, when it is simply in accordance with an act of congress, or why the exemption from a burden should be deemed so conclusive a reason for the deprivation of a right.

That in many of the states, as in this, they are eligible to office, is unquestioned. Equally so is it that they are not elected. But the great mass of the population of the country are eligible, but are not elected to office. Non-election is no proof of want of citizenship in one man more than another who may not happen to be elected.

The judicial opinions to which reference has been made will be found to afford little authority for the doctrines in support of which they have been cited.

It seems, from examining the case of *Crandall* v. *State*, 10 Conn. R., 339, that the legislature of Connecticut passed a statute prohibiting schools for the education of free colored persons; that the plaintiff, in error, established such school in violation of the statute; that she was thereupon indicted and convicted; that the presiding judge, in his charge, instructed the jury that free negroes were not citizens of the United States; that exceptions to his rulings upon this, and other questions arising during the trial, were taken; that upon their hearing, the court above reversed the judgment of the court below, upon other grounds than that of citizenship, expressly declining to consider that, as not being necessary for the reversal of the judgment against the original defendant.

In *Amy* v. *Smith*, 1 Lit. (Ken.,) 334, the court says, "It results that the plaintiff cannot have been a citizen, either of Pennsylvania or of Virginia, unless she belonged to a class of society upon which, by the constitution of *the states*, was conferred a right to enjoy *all* the privileges and immunities appertaining to the state. That this was the case there is

no evidence in the record, and the *presumption is against it.* * * It is true that when the plaintiff resided in Pennsylvania, and removed to Virginia, the constitution of the United States had not then been adopted; and prior to its adoption, *the several states might make any persons whom they chose, citizens.* But, as the *laws* of the United States do not authorize any but a white person to *become* a citizen, it marks the public sentiment upon the subject, and *creates a presumption* that no state has made persons of color citizens, and this *presumption must stand*, until positive evidence to the contrary was produced. But none such was produced, either as to Pennsylvania or Virginia."

This opinion concedes that free colored persons *might be citizens after the adoption of the constitution*, but claims that the presumption is against it, and that such presumption must stand till the contrary is established, which, in that case, was not done.

In *State* v. *Claibourne*, 1 Meigs R., (Tenn.,) 339, the decision rests on the ground that those only are to be regarded as citizens, who are entitled to privileges and immunities of the most favored class. "The meaning is," say the court, "that no privilege enjoyed by, or immunity allowed to the most favored class, shall be withheld from the citizens of any other state."

The argument against the presumption of the citizenship of free men of African descent, is drawn in the cases cited from the fact that they labor in certain states under disabilities not incident to the white race, and from the assumption that the possession of entire equality of political power is essential to constitute them citizens. But this assumption is unsound. If it were true, a citizen removing from a state in which a property qualification is not required for the right of suffrage, into one where it is, would cease to be a citizen, unless possessing the amount made requisite by the laws of the state into which he has removed. "But surely," says GASTON, J., in *State* v. *Manuel*, "the possession of political power is not essential to constitute a citizen. If it be,

then women, minors, and persons who have not paid public taxes, are not citizens; and free white citizens, who have paid public taxes and arrived at full age, but have not a freehold of fifty acres, inasmuch as they may vote for one branch and cannot vote for the other branch of our legislature, it would be to introduce an intermediate state between citizens and not citizens. The term 'citizen,' as understood in our law, is precisely analogous to *subject* in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people; and he who was before a subject of the king, is now a citizen of the state." These views seem to meet the cordial concurrence of Chief Justice TANEY. "Undoubtedly," he remarks, "a person may be a citizen, that is, a *member* of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote, or hold a particular office, those who have not the necessary qualifications cannot vote or hold the office, yet they are citizens." It is thus apparent that the reasoning of the cases cited in his opinion, to show that because an African may not have all political rights he is therefore not a citizen, is overruled by its own clearly expressed doctrines, and is pronounced by him to be unsound and fallacious.

In conflict with the opinion of Chief Justice TANEY, will be found the case of *Legrand* v. *Darnall*, 2 Pet. R., 664.

"It appears," says Chief Justice TANEY, in his account of the case, "from the report that Darnall was born in Maryland, and was the son of a *white man by one of his slaves*, and his father executed certain instruments to *manumit him*, and devised him some landed property in the state. This property Darnall afterwards sold to Legrand, the appellant, who gave his notes for the purchase money. But becoming

afterwards apprehensive that the appellee had not been emancipated according to the laws of Maryland, he *refused* to pay *the notes* until he could be better satisfied as to Darnall's right to convey. Darnall had in the mean time taken up his residence in Pennsylvania, and brought suit on the notes, and recovered judgment in the District Court of Maryland." Legrand raised no objection to the jurisdiction of the court in the suit at law, *because* he was himself anxious to obtain the judgment of the court upon his title. Consequently, there was nothing in the record to show that Darnall was of African descent, and the usual judgment and award of execution was entered. And Legrand *thereupon filed his bill on the equity side* of *the Circuit Court, stating that Darnall was born a slave and had not been legally emancipated,* and could not, therefore, take the land devised to him, nor make Legrand a good title, and praying an injunction to restrain Darnall from proceeding to execution on the judgment, *which was granted.* Darnall answered, averring that he was a freeman, and capable of conveying a good title. Testimony was taken on this point, and at the hearing the Circuit Court was of opinion that Darnall was a freeman and his title good, and dissolved the injunction and dismissed the bill; and that decree was affirmed here, *upon the appeal of Legrand.*

This is the case as stated by Chief Justice TANEY.

"The bill alleges," says DANIEL, J., by whom the opinion of the court was given, "that the mother of Nicholas Darnall was the *slave* of the testator, and *Nicholas was born* the slave of his father, and was between ten and eleven years old at the time of the death of the testator." "The appellee *admitted all the facts stated in the bill,* except that of his inability to gain a maintenance when his freedom commenced," &c.

The reporter says, "the case was submitted by TANEY, (then at the bar, and now Chief Justice,) for the appellant, without argument, he stating that it had been brought up

merely on account of its great importance to the appellee, which rendered it *desirable that the opinion of the Supreme Court* should be had on the matter in controversy."

The Supreme Court has no jurisdiction except when there is the necessary averment of citizenship on the part of the plaintiff and defendant. It may be assumed that such averments were made in the suit at law; and if so, as there was no plea in abatement, the record would show a case in which the court had jurisdiction.

But the bill set forth that "Darnall was a negro of the African race,"—that he was born a slave of a slave mother, and all this was admitted in the answer, and appears of record.

"When a plaintiff," remarks TANEY, C. J., "sues in a court of the United States, it is necessary that he show in his pleading that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue therein. And if he omits to do this, and should, by any *oversight of the court*, obtain a judgment in his favor, the judgment will be reversed in the appellate court for want of jurisdiction in the court below." But that Darnall was a free negro of the African race—a slave by birth—the child of a slave mother—was alleged in the bill and admitted in the answer, and appeared of record. If these facts are inconsistent with citizenship, then his want of citizenship was patent in the proceedings, and no plea was necessary, and the bill should have been dismissed; "for," remarks TANEY, C. J., "the want of jurisdiction in the court below may appear on the record without any plea in abatement." He further adds: "Where the defect of jurisdiction is *patent* on the record, this court is bound to reverse the judgment, though the defendant has not pleaded in abatement to the jurisdiction of the inferior court."

Notwithstanding all this, the court in the equity case assumed jurisdiction and adjudicated upon the rights of the parties, when, if African descent is a bar to citizenship, they had no jurisdiction whatsoever.

"Notwithstanding," says TANEY, C. J., "if anything in relation to the construction of the constitution can be regarded as settled, it is that which we now give to the word 'citizen,' and the word 'people,'—that is, that free colored men of African descent, from slave ancestors, are not citizens; yet the learned counsel for the appellant, *when the want of jurisdiction was thus apparent, appealed from one court not having jurisdiction to another court in the same category, for the purpose of obtaining its opinion in a cause in which they had no jurisdiction;* and the court before which the appeal was pending, thus without jurisdiction, and where jurisdiction could not be given by consent, instead of dismissing the action, as by law they were bound to do, heard and determined it. "And certainly," remarks C. J. TANEY, "an error in passing a judgment upon the merits in favor of either party, in a case which it is not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit."

Such is the case of *Legrand* v. *Darnall.* The jurisdiction of the court could not attach, because Darnall, if the decision of C. J. TANEY be correct, was not a citizen. It could not attach, because in another suit, sought to be enjoined, false averments of citizenship had been made. The suits were several and distinct. It would be absurd to hold, because a suit at law had been brought, in which there were false averments of citizenship, and to which no plea in abatement had been filed, that such *false averments* would confer jurisdiction in equity, when the want of jurisdiction was fully disclosed by the record.

It is true the ability to convey did not depend upon citizenship; but the ability to sue or be sued, in equity, did; and that is the only matter pertinent to the question of jurisdiction.

It might have been desirable to prevent the plaintiff in the suit at law (Darnall) from enforcing his judgment "by execution, if the court were satisfied that the money was not equitably and justly due;" but howsoever desirable, it is

not easy to perceive how it could be done by a court not having jurisdiction, and when such want of jurisdiction was "patent on the record."

It is true the question was not raised; but, say the court in *Rhode Island* v. *Massachusetts*, 12 Pet. R., 718, "whether the want of power is objected to by a party, or is apparent to the court, it must surcease its action or proceed extra judicially."

This and similar cases are only important as showing that the practical construction of the constitution by the Supreme Court of the United States, and by the most eminent members of the bar, has been for more than half a century in favor of the citizenship of those of African descent.

It was admitted in the *U. S.* v. *Ritchie*, 17 How. R., 524, that by the laws of Mexico, an equality amongst all the inhabitants, whether European, African, or Indian, was recognized, and that they were all citizens of that republic, and by treaty became citizens of this government.

Now, however difficult it may be to find anything in the constitution from which an inference can be drawn that citizenship depends upon color, or descent, when there is no allusion therein in reference to citizenship, to either, it is still more difficult to find language from which it can be inferred that the native born free men of a particular race are to be debarred from citizenship, while that great privilege is to be accorded to the foreign born of the same race. But if all this can be found in the constitution, then the general proposition denying citizenship to free colored men of servile origin, must be qualified by the exception of those of foreign birth, who by treaty have become citizens.

The clause in the constitution as to general citizenship, would, according to the different judicial expositions of members of the Supreme Court, read thus: "Citizens of each state (the free native colored citizens of each state excepted, but including those of the same race who have become citizens of the United States by treaty) shall be entitled

to all privileges and immunities of citizens in the several states."

This, to be sure, does not read much like the original article, but such is to be its reading as now claimed.

The "two clauses in the constitution which point directly and specifically to the negro race," refer only to those who were slaves, and not to the free. That the slave is a citizen, is not pretended. But these clauses refer exclusively and entirely to the slave; and while it may be conceded that they "show clearly that they were not regarded as a portion of the people, or citizens of the government then formed," it is not easily seen how they can show any such thing as to free men, to whom they do not and cannot refer.

As these clauses apply only to the *status* or condition of a particular class, they can in no way affect the rights of those who do not belong to that class. So far as regards the free they might as well be eliminated from the constitution, for they do not directly nor impliedly affect them.

"It is true," says Chief Justice TANEY, in the same case, "that every person and every class and description of persons, who were at the *time* of the *adoption of the constitution recognized as citizens in the several states, became also citizens of this new political body;* but none other. It was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty, were intended to embrace those only who *were then members of the several state communities,* or who should afterwards, by *birthright* or *otherwise,* become members, according to the provisions of the constitution, and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities, into one political family, whose power for certain specified purposes was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges, outside of his state, which he did not before possess, and placed him, in

every other state, upon a perfect equality with its own citizens, as to rights of person and rights of property; it made him a citizen of the United States."

It thus appears, that if in a single state the free men of African descent were, by its constitution, citizens at the time of the adoption of that of the United States, they are, in the clearly expressed and deliberate judgment of Mr. Chief Justice TANEY, citizens of the United States. Now there are no historic facts more completely established, than that during the revolution they were enlisted, and served as soldiers; that they were tendered and received as substitutes; that they were required to take, and took the oath of allegiance; that they held real estate; that (without recurring to other instances) they were citizens in North Carolina and Massachusetts, under constitutions formed before that of the United States, by the clear and express language of those constitutions; that they were adjudged to be citizens of those states, by the repeated decisions of their highest judicial tribunals; *State* v. *Manuel*, 2 Dev. and Bat., 20; *State* v. *Newcomb*, 5 Iredell R., 253; *Com.* v. *Aves*, 18 Pick. R., 210; that in North Carolina they exercised the right of suffrage, and all the privileges of citizenship, till the revision of their constitution in 1835, and that in Massachusetts they have exercised and continue to exercise it to this day.

If these things be so, and that they are so cannot be denied or even doubted, and if they had been known to the learned Chief Justice, his conclusions would have been different, for he says, "every person and every class and description of persons, who *were at the time of the adoption of the constitution recognized as citizens of the several states, became also citizens of this new political body.*" His published opinion, therefore, rests upon a remarkable and most unfortunate misapprehension of facts, and his real opinion upon the actual facts must be considered as in entire and cordial concurrence with that of his learned dissenting associates.

Each state being sovereign, and having full and uncon-

trolled power over the *status* of its inhabitants, the constitution of the United States having imposed no restrictions as to the color or race of those who may be citizens of a state, the people of this state, in convention assembled, formed a constitution upon principles of the purest democracy, making no distinctions and giving no preferences, but resting upon the great *idea of equality before the law.*

In the convention by which this constitution was formed, a motion was made by Mr. Vance, of Calais, to exclude negroes from the rights of suffrage.

Upon that motion, Mr. Holmes remarked as follows: "The Indians not taxed were excluded, not on account of their color, but of their political condition. They were under the protection of the state, but they can make and execute their own laws. They have never been considered members of the body politic. But I know of no difference between the *rights* of the negro and the white man. The Almighty has made none. Our declaration of rights has made none. That declares that all, without regard to colors, are born equally free and independent." Perley's Debates, 94.

Upon the vote being taken, the motion was negatived.

It is therefore demonstrable, by recurring to the constitution of this state, that those who framed the constitution, and the people by whom it was adopted, regarded free colored persons (natives) as citizens of the United States, and entitled to the right of suffrage.

The constitution having been adopted, the state applied for admission, and was admitted into the Union as one of the United States. Her constitution is republican. She is equal among equals. She has determined the citizenship of her inhabitants. Her citizens are entitled to that equality of right and privilege which, by the constitution, is accorded to "the citizens of each state." To discriminate between her citizens, when she has seen fit to make no discrimination, would be to trench upon her rights as a sovereign state.

Adopting, then, the views of those by whom the constitu-

tion was framed, so far as it can be gathered from their cotemporaneous action and exposition; following its plain and unambiguous language; relying upon the views of the Jeffersons, Madisons and Monroes of the early days of the republic; upon the decisions of the Supreme Court of the United States, and upon those of the state courts; upon constitutions formed before that of the United States, and upon the judicial construction of those constitutions; upon the legislative enactments of, and the treaties made by, this government; reposing upon the judicial authority of the Marshalls, the Catrons, and the Gastons, the Kents, and the Storys; recognizing as obligatory the acknowledged and unquestioned principles of international and municipal law; after a careful and deliberate examination of the whole subject, an examination due alike to the great questions of American citizenship and state sovereignty, the conclusions to which I have arrived, are these:

That free persons of African descent and servile origin, being natives, were citizens under the confederation;

That they were citizens in most of the states before the adoption of the constitution of the United States;

That they have not been deprived of their citizenship by the constitution;

That the constitution imposes no restriction upon the state by which any portion of its native born inhabitants are prohibited from being citizens;

That each state being sovereign, has full right to determine the political condition and citizenship of its native inhabitants;

That the people of Maine, in the exercise of their sovereign power, have conferred citizenship upon those of African descent;

That being citizens of Maine, they are *by that fact* citizens of the United States, by virtue of that clause in the constitution by which "the citizens of *each* state SHALL be entitled to all privileges and immunities of citizens in the several states;"

And that, consequently, having the required qualifications, they are entitled to vote.

With great consideration,
I have the honor to be,
Your obedient servant,
JOHN APPLETON.

HON. MR. CHAPMAN, *President of the Senate of Maine.*

OPINION OF JUDGE DAVIS.

To the HON. HIRAM CHAPMAN, *President of the Senate of Maine:*

I have the honor herewith to present my opinion, as one of the justices of the Supreme Judicial Court, in answer to the question propounded by the order of the senate, of March 26, 1857—"Are free colored persons, of African descent, having a residence established in some town in this state for the term of three months next preceding any election, authorized under the provisions of the constitution of this state, to be electors for governor, senators and representatives?"

By "free colored persons of African descent," I conclude that the senate, in their order of March 26th, referred only to persons of that description born within the territorial limits of the United States. For, by the naturalization laws of this country, no aliens can become citizens unless they are "white persons."

By article second, section first, of the constitution of this state, it is provided, that

"Every male citizen of the United States, of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians, not taxed, having his residence established in this state for the term of three months

next preceding any election, shall be an elector for governor, senators and representatives."

This provision so restricts the right of suffrage that only about one fifth part of the population possess it, as a personal franchise; and it is expressly limited by it to "citizens of the United States."

The term "citizen," in its general and comprehensive sense, includes all the inhabitants, or permanent residents in a country. By most lexicographers, and by some writers upon the science of law, citizenship is made to depend upon the possession of the right of suffrage, and other franchises of the government. Webster defines a citizen to be "a person, native or naturalized, who has the privilege of exercising the elective franchise," and is able "to purchase and hold real estate." Bouvier, in his Law Dictionary, describes a citizen as "one who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers; and who is qualified to fill offices in the gift of the people."

These definitions approximate, perhaps, to the popular sense of the term. But they are far too inaccurate to be accepted in determining personal rights under the constitution and laws of the United States. They describe but few, if any, of the essential attributes of citizenship.

All voters are not, necessarily, citizens. The right of suffrage is merely municipal, controlled by local law. Any state may confer this right on aliens; and the United States may do the same. It has, in fact, been done by some of the states, and by congress, within the territories subject to their control.

Nor are all citizens voters. Women and children, and persons under guardianship, and paupers, are all citizens, if born in this country; but they have not the right of suffrage.

Nor is the capacity to purchase and hold real estate any longer a certain test of citizenship. It was otherwise by the English common law, and it remained so in the United States

during the earlier period of our history. But a more liberal policy has since prevailed, so that *aliens* are permitted to hold real estate, by special provision of the constitution or the laws of most of the states. It has never been contended, however, that they are thereby made *citizens* of the states, or of the United States. It is manifest, therefore, that citizenship, under the constitution and by the laws of the United States, is something outside and independent of the franchises and privileges which usually, but not uniformly, accompany it.

A citizen is a subject of the government within whose territorial limits he resides. To this government he owes allegiance; from it he is entitled to protection, whether he is at home or abroad. (For a clear statement of this doctrine, see Mr. Marcy's letter of September 26, 1853, to the Austrian minister.) The term "citizen" implies *residence* and *allegiance;* but such residence is not affected by temporary absence from the country, *animo revertendi.* By the English common law, allegiance is perpetual; the citizen cannot divest himself of it, except by special consent of the government. Whether this rigorous rule is still the law of this country, has never been fully settled. But however this may be, so long as one remains a citizen of the United States, protection is due on the one hand, and allegiance on the other. And if such citizen adheres to the enemies of the country, or engages in war against it, he is guilty of treason.

It is true that aliens, residing here, are protected by our government, and, therefore, they owe a qualified allegiance. But they may expatriate themselves at pleasure, and then the duty of the government to protect them ceases; and even while here, as they are but partially clothed with the immunities of citizenship, so they are free from most of its obligations and burdens.

But all citizens, of whatever age, sex or condition, owe an unqualified, entire allegiance. Their privileges under the government may depend on age, sex or condition, and not

on their allegiance; their citizenship is determined by this alone. And as no person born within the jurisdiction can avoid this allegiance, it is not optional with him whether to assume it; so the government cannot avoid its responsibility to afford protection; it is not optional with that whether to accept such allegiance. This principle is as old as the common law, and is fundamental in all free governments. In this country, the Indian tribes have always been permitted to maintain their separate nationalities, and have never been considered within our jurisdiction. But with this exception, every person born within our territorial limits owes this allegiance, and is constituted a citizen, as an inevitable consequence of his birth; and no alien can become a citizen, until he voluntarily assumes such allegiance under the solemnities of an oath. All civilized nations have always claimed and exercised the right to determine upon what conditions an alien might become a citizen.

All persons, wherever born, residing in the United States at the time of the declaration of independence, and yielding to it an express or implied sanction, became parties to it, and are to be considered as natives, their social tie being coeval with our existence as a nation. (2 Kent's Com., 39.) There was, for a time, some doubt about the citizenship of those foreigners who came into the United States during the revolution. But it finally became the settled doctrine, that all persons, wherever born, residing in this country, and adhering to our government, at the time of the treaty of peace, in 1783, were to be considered as natives, owing allegiance. (3 Peters' R., 161, 242.) All such persons were citizens of the United States at the time of the adoption of the federal constitution.

Under the confederation, each state exercised the power, and fixed the terms of naturalization for itself; and great confusion resulted from it. In Maryland, for instance, the Roman Catholics were numerous and influential. But in New York the feeling of hostility to this sect was so great, that they adopted a rule of naturalization which excluded

them. Some states required a long residence; others, one comparatively brief. And as the citizens of any one state had the rights of citizens in every other, conflicts were liable to ensue, and the evil became a serious one. It was this which led the states, when the constitution was formed, to relinquish to the federal government the exclusive power of naturalization, that there might henceforth be a uniform system. (Federalist, No. 32 and No. 42; Story's Com., 3, s. 1098.) From that time, no one could be a citizen of the United States, or of any state, except by birth, or by naturalization, according to such laws as congress should enact.

It is not denied that the possession of the right of suffrage, and other franchises of the government, is some *evidence* that a person is a citizen. These privileges, though not granted to all citizens, are generally withheld from all who are not citizens. A man who has voted for twenty years in any state, may well be presumed to be a citizen. Not that his voting does anything towards making him a citizen. It only creates the presumption that he *was born in this country*, or else *has been naturalized;* just as possession of real estate for twenty years secures a title; not that possession itself has any merit, but because it creates the presumption of *a prior grant.*

It is perfectly apparent that the term "citizen of the United States" is used in this sense in the federal constitution. It occurs but three times. In order to be eligible as a representative in congress, a person must have been "seven years a citizen of the United States;" or as a senator, "nine years a citizen of the United States;" or as president, "a *natural born* citizen of the United States." It is manifest that allusion is here made to the two modes of becoming a citizen; and there is a clear recognition of the common law principle that birth makes a person a citizen by *natural right.* And there is not in any part of the constitution the slighest foundation for the inference that citizenship should depend upon the possession of the franchises and privileges of the government; or that the federal gov-

ernment should have any power to deprive any citizen of his citizenship.

And it is quite as clear that the term "citizen of each state" is used in the federal constitution in the same sense. When the several states merged themselves as one nation, under one government, citizenship, in its relation to foreign nations, was national only. Allegiance abroad could not be severed by any state, but only by the United States. Still, the states retain their sovereignty, and all citizens owe allegiance to them; and, in that sense, they are citizens of the states. Treason can be committed, as well against the states, as against the United States.

Every citizen of the states is a citizen of the United States; but what relation do the citizens of the several states sustain to each other? Congress has power to naturalize *foreigners;* but if a citizen of Massachusetts removes to South Carolina, who shall say whether he must be naturalized in order to become a citizen of the latter state? If each state might decide this for itself, there would be no reciprocity, and the Union, instead of being "more perfect," would be less perfect than it was under the confederation. For by that it was provided, in the fourth article, "that the free inhabitants of each state should be entitled to all the privileges and immunities of free citizens in the several states." Accordingly a similar provision was incorporated into the federal constitution. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." (Article four, section two.) This provision, *proprio vigore,* makes every citizen of the United States a citizen of the state in which he resides; and every citizen of each state a citizen of the United States. For it is clear that the states, when they entered into this compact, reserved no right to exclude from citizenship any class of free persons born in the United States. If otherwise, citizens of one state might be deprived of "the privileges and immunities of citizens" in another. So that every person born in the United States, or naturalized, or made a citizen

by any treaty, has a right to citizenship in each state, of which that state cannot deprive him. If one state can dissolve the allegiance of any class of persons residing within its limits, and exclude them from citizenship, while the same class of persons are citizens of other states, we are still exposed to all the conflicts and troubles to which the states were liable in consequence of their separate power of naturalization under the confederation; and the evils are magnified and aggravated by their liability to fall upon native born, as well as naturalized citizens.

And as no state can exclude any class of persons from citizenship, so by granting the right of suffrage, and other franchises, to persons not citizens, they do not make them citizens. Every state may grant these franchises to *aliens*, but it does not thereby make them citizens of the state. Nor does the withholding of these franchises deprive any class of persons of any of the "privileges or immunities of citizens." The meaning of these terms, according to the highest authority, "is confined to such privileges and immunities as are fundamental, and belong of right to all free governments; such as the rights of protection of life and liberty; to acquire and enjoy property." (2 Kent's Com., 71.)

Judge STORY gives the same construction to this provision. "It is obvious that if the citizens of each state were to be deemed *aliens* to each other, they could not take or hold real estats, or other privileges, except as other aliens. The intention of this clause was to confer on them *a general citizenship*." (Story's Com., 3, s. 1800.)

PARKER, Chief Justice of Massachusetts, in *Abbott* v. *Bailey*, 6 Pick. R., 89, gives it the same construction. Citizens of any state "shall not be deemed *aliens* in any other; but they may take and hold real estate, and may, *according to the laws of such state*, enjoy the full rights of citizenship, *without being naturalized*."

And as no state, though it may withhold the elective franchise from citizens, can deprive them of their citizenship, so the federal government cannot deprive any class of per-

sons of their citizenship. All free persons, native born, and all aliens, after they are naturalized, possess an *indefeasible* citizenship, of which no department of the federal government can divest them. The right of native born persons to citizenship is not within its jurisdiction. Not only is there no grant of any such power in the constitution; not only would the exercise of any such power be establishing privileged classes, in violation of its letter and spirit; but the existence of any such power would involve the total annihilation of the sovereignty of the states. Citizenship is indispensable to the security of other rights. If the federal government may deprive any class of persons of their citizenship, it may at any time reduce the population of any state, in whom the sovereignty resides, to the condition of aliens. The mere statement of the proposition is a sufficient refutation of it.

If the foregoing principles are sound, the following propositions seem to me conclusively to follow: *that* all free persons, born within the limits and jurisdiction of the United States, are citizens thereof, and, as such, are citizens of the several states where they reside; *that* the citizens of each state have the right to become citizens of any other state, simply by a change of residence, without any consent, or right of refusal, on the part of such state; *that* the right of suffrage is not an essential attribute to citizenship; *that* as states withhold this franchise from many classes of citizens, so they have power to confer it upon aliens; *but that* neither any state, *nor the federal government*, can deprive any class of free persons, born within the United States, of their citizenship.

I need not say that these propositions affirm the citizenship of free colored persons of African descent. That this class of persons, at the time when our independence was established, were regarded as citizens throughout the United States, and that in nearly all the states they exercised the most important franchises, are facts that cannot be controverted. That they owed allegiance to the government, both

state and national, and would have been held guilty of treason for the same acts that would have constituted treason in other citizens, cannot be doubted. That they were able, without regard to special provisions of statute, to purchase and hold real estate, in every state, north and south, has never been questioned. The conclusion is irresistible, that they were, and are, citizens of the United States.

Even slaves, *while remaining such*, have been regarded as, in some sense, citizens. They were once held, by the Supreme Court of New York, capable of holding land granted by the government for services during the American revolution. This doctrine was justified on the ground of its necessity for purposes of justice; "the gratitude of the country was due to the defenders of our rights in the revolutionary struggle." *Jackson* v. *Lervey*, 5 Cowen's R., 397. But though this may be questioned, it is true, that in contemplation of law, slaves are citizens whose rights are held in abeyance by the power of the master; whom the master alone, without any concurring act on the part of the state, subject only to some statutory regulations, can at his own pleasure, by manumission, reinvest with all the rights and obligations of citizenship. The master, by manumission, only unchains what was bound, permitting the exercise of rights that previously existed, though dormant, or suspended.

Emancipated slaves, like other free persons of African descent, may hold and transfer real estate, may sue and be sued, and they are held as citizens, in distinction from *aliens*, in all the slave states. A few years before Mr. TANEY was appointed Chief Justice of the United States Supreme Court, he was counsel for one who was sued by an emancipated slave, in the Circuit Court for the district of Maryland. Instead of pleading this fact *to the jurisdiction of the court*, he defended on other grounds, by a petition for an injunction; but the suit was sustained, on appeal, in the Supreme Court of the United States. *Legrand* v. *Darnall*, 2 Pet. R., 664. The question of jurisdiction was not raised; but the fact

that it was not, indicates that the idea that such a person is not a citizen of the United States, has had its birth since that time. And as late as 1843, an emancipated slave was held by C. J. TANEY to be capable of suing in the Circuit Court, and his petition for his freedom was sustained in the Supreme Court of the United States. *Williams* v. *Ash*, 1 Howard R., 1.

I have already alluded to the evils arising under the confederation from the separate powers of naturalization still retained by the states, in connection with the right of citizens of each state to the privileges of citizens in every other. So that, though a Roman Catholic could not be naturalized in New York, except on such terms as he would not accept, he could become a citizen of some other state, and then, by a change of residence, could be a citizen of New York. "Thus," said Mr. Madison, "the law of one state could be preposterously rendered paramount to the law of another, within the jurisdiction of another." (Federalist, No. 42.) And he said that it was owing to mere casualty that serious embarrassments were escaped; but that the federal constitution "had made provision against them, and all others proceeding from the defect of the confederation on this head." But if citizenship is to depend on *color*, he was greatly mistaken. The ills we have found are worse than those from which we escaped.

In order to remedy such evils, it was essential that citizenship should be a matter of *certainty* and of *uniformity*.

But if color was to be a test, there could be no *certainty*. By intercourse, either licit or illicit, the African race have so commingled with the Anglo-Saxon, that, in regard to great numbers of the population of this country, it is very *uncertain* to which race they belong. In the southern courts, it is a question of fact, constantly arising, to be decided by juries, not only upon testimony, but by personal inspection. If citizenship hangs on the issue, we shall need a new class of experts before all tribunals, from the highest national courts to the humblest judges of elections.

Neither could there be any *uniformity*. To secure this, and avoid the evils incident to the confederation, the constitution empowered congress "to establish a *uniform* rule of naturalization." But there is no uniform rule among the states as to what constitutes a "white person." In some of the states, the slightest preponderance of white blood, though only of a sixty-fourth part, makes a person white; while in others it requires more than three-fourths, or, perhaps, more than seven-eighths. (*Bailey* v. *Fiske*, 34 Maine R., 77.) A person of only one-fourth African blood, in Maine, is a "white person." If color were the test of citizenship, he would be a citizen of this state; and, as such, entitled to all the privileges and immunities of a citizen in the other states. But if he should go to South Carolina, he would be denied all such rights, and be liable to be imprisoned, and, in certain cases, for no offence, to be sold as a slave. Such a rule of citizenship cannot be found in the constitution; it is repugnant to it, and cannot but tend to subvert and destroy it.

If it be said that history shows that at the time when the federal constitution was adopted, the white population of the country did not intend to admit colored persons of African descent to the privileges of citizenship, while the assertion is denied, it is also replied that we have no right to inquire what one class of persons intended, in derogation of the rights of any other class. It would be just as legitimate to inquire whether the African race intended to admit the whites to the privileges of citizenship. They all resided together, participants of that freedom which was the fruit of their common struggles and sacrifices. Whatever their disparity in numbers, or condition, neither had the right to eject the other from the common purchase, or make them aliens from the commonwealth. Such a right does not exist under any free government; certainly not under a government whose corner stone was laid upon the principle "that all governments derive their just powers from the consent of the governed."

But if the matter were pertinent, I affirm, as a historical fact, that at the time when our independence was established, the white population of this country did recognize the citizenship of colored persons of African descent, and did intend to secure to them the rights of citizens. That they at that time possessed the privileges and immunities of citizens in the states, and in nearly all of them enjoyed the right of suffrage as a constitutional right, is beyond all question. The members of the congresses, both before and during the confederation, were chosen, in part, by such persons. They were bound to represent these persons as a part of their constituents; and no evidence exists that they were not true to their trust. On the contrary, the evidence is indubitable that, during the whole period of our struggles, from the commencement of the agitation which resulted in the declaration of our independence, to the adoption of the federal constitution in 1789, the freedom and elevation of the African race was a prominent and cherished purpose with the leading statesmen of the country, both north and south.

On the 20th of October, 1774, the first continental congress passed the following resolution:

"We, for ourselves, and the inhabitants of the several colonies whom we represent, firmly agree and associate, under the sacred ties of virtue, honor, and love of country, as follows: we will neither import, nor purchase any slaves imported, after the first day of December next, after which time we will wholly discontinue the slave trade; and we will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it."

In 1775, the same congress solemnly denied that "the divine Author of our existence intended a part of the human race to hold an absolute property in, and an unbounded power over others."

In 1776, the declaration of our independence was unani-

mously adopted, declaring "liberty" to be an unalienable right of "all men."

On the 25th of June, 1778, an effort was made to amend the fourth article of the confederation, providing that "the free inhabitants of each of these states, shall be entitled to all the privileges and immunities of free citizens in the several states," by inserting the word "white" after the word "free," and before the word "inhabitants," so that colored persons should no longer have the right of general citizenship. But the amendment was defeated, only two states voting for it. That body could not have made a more explicit declaration, that colored persons, of African descent, were citizens of the United States.

In 1787, congress unanimously adopted the ordinance for the government of the territory north-west of the Ohio river, declaring that "there should be neither slavery, nor involuntary servitude therein, except as a punishment for crime." So far as slavery is a suspension or temporary extinction of citizenship, what measure could have been better adapted to secure to colored persons the right of citizenship? And yet there was not a single vote against it, from that portion of the United States where slavery now exists.

Does not this record prove, beyond any doubt, that during this formative period of our national institutions, the people of this country, instead of entertaining any design to deprive colored persons of their rights, and exclude them from citizenship, recognized them as citizens of the United States, and adopted effectual measures to protect them as such?

If we turn to the legislation of the several states during this period, we find abundant evidence of the same historical fact. Vermont abolished slavery in 1777; Massachusetts in 1780; New Hampshire in 1784. Pennsylvania passed an act of emancipation in 1780; and Connecticut and Rhode Island in 1784. All this was under the confederation: and all persons so emancipated thereby became, without any question, at that time citizens of the United States.

Nor was any change made, or attempted, when the federal constitution was formed. Nearly one half of the states had abolished slavery, either absolutely or prospectively; and the general expectation was that the others would do the same, at some future time; which was done afterwards by New York and New Jersey. The constitution was, therefore, so framed, that while it should not interfere with slavery within the states, so long as it should exist, it would need no change or amendment when slavery should be abolished. *It was adapted to a free country.* Mr. Madison declared, in the convention that framed it, that it ought to exclude "the idea that there could be property in man." That this character was given to it by the deliberate purpose of the convention, is evident from its action upon the clause for the rendition of fugitives. (Article four, section two.) As originally reported, it was as follows: "No person held to *servitude*, or labor, &c." On motion of Governor Randolph, of Virginia, the word "servitude" was stricken out, and the word "service" inserted, by a unanimous vote; "the former being thought to express the condition of slaves, and the latter the obligations of free persons." (Madison papers.)

In whatever field the search is made, therefore, there is an entire failure of any evidence, contemporaneous with the adoption of the constitution, that the white population of the United States, if they had possessed the right, had any desire, or intention, to exclude the African race and their descendants from the benefits, privileges, and immunities of citizenship.

In 1823, the question was presented to the court of errors in the state of New York, whether the Indians belonging to the Six Nations were "citizens." And the court, in an elaborate opinion, pronounced by Chancellor Kent, decided that they were not citizens. The prominent ground of the decision was, that the Indians, instead of being incorporated among our own population, have always been permitted to maintain their own independent governments; "that they

are not subjects, born within the purview of the law, because not born in obedience to us, but under the dominion of their own tribes;" and that from 1775, by numerous treaties and public acts, "we have recognized their tribes as national communities."

It will be noticed that not one position here taken as evidence, that Indians, living in independent tribes, are not citizens, can be applied at all to the colored population of this country.

The learned chancellor, in illustrating the subject, alludes to the privileges and obligations which usually attend citizenship. "Do we interfere with the disposition, or the tenure, or the descent of their property, as between themselves? Do we prove their wills, or grant letters of administration on their intestate estates? Do our Sunday laws, our school laws, our poor laws, our laws concerning infants and apprentices, or concerning idiots, lunatics, or habitual drunkards, apply to them? Are they subject to our laws, and the laws of the United States, against high treason? And do we punish them as traitors, instead of public enemies, if they make war upon us? Are they subject to our laws concerning marriage and divorce; and would we sustain a criminal prosecution for bigamy, if they should change their wives, or husbands, at their own pleasure, and according to their own customs, and contract new matrimonial alliances? I apprehend that every one of these questions must be answered in the negative. In my view, they have never been regarded as citizens or members of our body politic, within the contemplation of the constitution."

Is there one of these questions, if applied to colored persons of African descent, that *can be* "answered in the negative?" And if, in view of these facts, "it is idle to contend that Indians *are* citizens or subjects of the United States," is it not equally idle to contend that colored persons *are not citizens?* I can find no language that so fitly expresses my convictions in regard to the proposition—*that colored persons of African descent are not citizens*—as that employed

by the court in this case: "No proposition would seem to me to be more utterly fallacious, and more entirely destitute of any real foundation in historical truth. It is repugnant to all the public documents, and to the declared sense and practice of the colonial governments, and of the government of the United States." (*Goodell* v. *Jackson*, 20 Johns. R., 693.)

I have thus far discussed this question as if it were new. I am aware, however, that it has been raised, and opinions have been given, in the courts of several of the southern states, and that it has recently been discussed at great length in the case of *Scott* v. *Sandford*, by the Supreme Court of the United States. And in this case I understand it to have been distinctly decided, that colored persons of African descent, whose ancestors were slaves, are not citizens of the United States. That such is the opinion as promulgated by C. J. TANEY, cannot be questioned. It was announced by him as "the opinion of the court;" and I do not perceive why the other members of the court should not be regarded as concurring in it, except upon those points which they have expressly disclaimed. The mandate to the circuit court could not have issued, except by order of a majority of the court. This mandate directed the case "to be dismissed for want of jurisdiction, for the reason that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the constitution." This was equivalent to an express denial that he was a citizen of the United States. And the ground of the decision was, that he belonged to a class of persons none of whom are citizens.

But though the Supreme Court of the United States have so decided, I do not consider their opinion as binding upon us, upon the question now presented to us. There may be cases in which we are bound to receive the decisions of that court as authority. How far this is the case is a disputed question. But it cannot extend to cases in which the powers of the state courts and of the United States courts are collateral, co-extensive and independent. Cases respecting

the right of suffrage, though that right is limited by the constitution of this state to citizens of the United States, are not cases arising under any law of the United States. (*Owings* v. *Norwood*, 5 Cranch R., 344.)

And if our court, upon claim of any colored person to be admitted to those privileges which are granted by our state constitution to citizens, sustain such claim, the case is not within the appellate jurisdiction of the Supreme Court of the United States. (12 Wheat. R., 117, 129.)

The opinion of the court, in the case of *Scott* v. *Sandford*, should therefore receive that consideration, and that only, to which its intrinsic merits entitle it.

I do not propose to examine this opinion at length. A few extracts will show its scope, and the consequences legitimately resulting from its adoption as the settled doctrine and policy of the country:

"The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the constitution, and can therefore claim none of the rights and privileges which that instrument provides for, and secures to citizens of the United States." (p. 404.)

If they can claim none of the rights of citizens, should they visit the south they would have the right to no protection, except such as the southern states "might choose to grant them." (p. 405.) When a ship-master from Boston enters any port in South Carolina, his colored seamen may be taken from him, confined in jail, and sold into slavery to pay the jail fees, and there is no redress.

"For if they were entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws, and from the police regulations which the slaveholding states considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one state of the Union,

the right to enter every other state whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, &c. It is impossible, it would seem, to believe that the great men of the slaveholding states, who took so large a share in framing the constitution of the United States, could have been so forgetful or regardless of their own safety, and the safety of those who trusted and confided in them." (p. 417.)

And if free colored persons are not citizens, they may be banished from the states in which they reside; or such as will not go may be reduced to slavery again. The governor of Virginia has more than once recommended this to the legislature of that state. The same may be done in Massachusetts, New York and Pennsylvania. And the fact that these persons have acquired property, support schools and churches, and sustain educated ministers, can make no difference. For,

"No distinction was made in this respect between the free negro or mulatto, and the slave; but this stigma, of the deepest degradation, was fixed upon the whole race." (p. 409.) "The number that had been emancipated were few, in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population, rather than the free." (p. 411.) "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect." (p. 407.) "The state of public opinion had undergone no change when the constitution was adopted." (p. 410.)

It seems to me that such assertions and such doctrines need only to be stated, in order to be rejected. They are so clearly in conflict with the whole tone and spirit, both of the writings and the deeds of the great men of the revolu-

tion, that it is difficult to conceive how they can be credited by any intelligent, unprejudiced mind. The worst enemy of our institutions could hardly say anything better a'apted to blacken the character of our ancestors, and cast reproach upon their memories.

If the Declaration of Independence "was not intended to include the enslaved African," but was a mere compact of their oppressors for their own advantage, while "the unhappy black race were never thought of or spoken of, except as property, and when the claims of the owner or the profit of the trader were supposed to need protection," then a decent respect for the opinions of mankind should have kept its authors silent. Such compacts had long been common enough, in limited monarchies, in aristocracies; even among brigands and pirates. Freedom of privileged classes, and equality among themselves, while trampling on the rights of others, was no new thing. The world did not need to be informed of it. As the manifesto of such a doctrine, the Declaration of Independence would not have merited the respect of mankind; it would not have justified a revolution; it would have given Washington and his compatriots no glory to fight for it, and their toil, and sacrifice, and blood, were offered in vain.

But it was not so. The Declaration of Independence was a heroic utterance of great truths, for all men; so understood by the world, so intended by its authors. They freely devoted fortune, honor, life, to sustain it. And they often avowed their purpose, as soon as the government should be established, to extend its blessings to the slaves. No man ever condemned slavery in stronger terms than Jefferson, Washington, and those who with them stood foremost in the revolutionary struggle. A resolution solemnly denying its right, was unanimously passed by the congress of 1775. The hope and the prophecy of general emancipation were the common theme of correspondence and public debate.

With this avowed purpose in view, the federal constitution was formed, and adopted by the people of the several

states. It was designedly so made as to need no amendment when slavery should be abolished. Its privileges were granted to all, without distinction of race or color. Free colored persons have always been recognized as citizens under it, and they are entitled to the same privileges and immunities which the constitution guarantees to other citizens. I am, therefore, of opinion that free colored persons, of African descent, if born in this country, are citizens of the United States; and that, with the same restrictions which apply to white persons, they are authorized under the provisions of the constitution of this state, to be electors for governor, senators and representatives.

WOODBURY DAVIS.

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